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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

THE UNITED STATES, PETITIONER

v.

THE OHIO POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINION BELOW

The opinion of the Court of Claims and the dissenting opinion of Chief Judge Jones (Appendix B, *infra*, pp. 19-22) are reported at 129 F. Supp. 215.

JURISDICTION

The judgment of the Court of Claims was entered on March 30, 1955 (Appendix B, *infra*, pp. 36-37). On June 18, 1955, the Chief Justice extended

the time for filing a petition for certiorari to and including August 12, 1955 (Appendix B, *infra*, p. 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the War Production Board in issuing necessity certificates for accelerated amortization had authority to certify only part of the cost of a new facility.

2. Assuming the Board had no statutory authority to issue partial certifications, whether it was proper for the Court of Claims to allow the taxpayer to amortize the full cost of the facility, even though the certifying agency had refused to do so.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 23(t) and 124 of the Internal Revenue Code of 1939, and the Regulations involved are Treasury Regulations 111, Section 29.124-6, all of which are set forth in Appendix A; *infra*, pp. 14-18.

STATEMENT

The taxpayer is a public utility which manufactures and distributes electrical energy. During World War II, as a result of its inability to meet the increasing demands for electricity, it decided to build a new electric generating plant at Brilliant, Ohio, along with a transmission line from this plant to its substation at Canton. This entire construction was known as the "Tidd Project Emergency Facility" and its amortizable cost was

\$11,246,256.54. (R. 2-3; ¹ Appendix B, *infra*, pp. 19-20.)

Pursuant to Section 124 of the Internal Revenue Code of 1939, which allows the rapid amortization over a period of five years or less of an "emergency facility" which has been certified as necessary in the interest of national defense, the taxpayer applied for a certificate of necessity applicable to the Tidd project. On November 9, 1944, the War Production Board issued Necessity Certificate No. NC-2029, addressed to the Commissioner of Internal Revenue, and stating that the Tidd project facilities were "necessary in the interest of national defense, during the emergency period, up to 35 percent of the cost * * * thereof." (R. 3-4; Appendix B, *infra*, p. 20.) Subsequent inquiry by the taxpayer revealed that this 35 percent certificate was issued "in accordance with the War Production Board policy [applicable] where the facilities sought to be certified were of such a nature as to be presumably useful in post-war operations." (R. 5.) In such cases only the excess cost due to the war emergency (determined by the Board to be 35 percent in the normal case) was certified.

Accordingly, the Commissioner, acting under the statutory mandate permitting rapid amortization for facilities covered by a necessity certificate, allowed the taxpayer to take rapid amortiza-

¹ "R." references are to the original record on file with this Court.

tion deductions only on the basis of 35 percent of the cost of the Tidd project, leaving the remaining 65 percent subject to the standard depreciation deduction. The taxpayer, on the other hand, contended that it was entitled to rapid amortization deductions on the basis of the full cost of the Tidd project since the statute did not authorize such partial certifications as the War Production Board had issued in this and other cases. (Appendix B, *infra*, p. 20.) Consequently, after filing a timely claim for refund, the taxpayer instituted the present suit in the Court of Claims. (R. 9, 10.) That court, relying completely on its decision in a similar case in 1952, *Wickes Corp. v. United States*, 108 F. Supp. 616,² gave judgment for the taxpayer in the sum of \$5,885,388.22 plus interest. Chief Judge Jones dissented, as he had done in the earlier case. (Appendix B, *infra*, pp. 21-22.)

REASONS FOR GRANTING THE WRIT

1. The crux of the decision below is that the War Production Board exceeded its statutory authority when it issued partial certifications of the kind here involved and that it was required to issue a certificate for 100 percent of the cost of the property. On that issue, the decision below is in direct conflict with *United States Graphite Co. v. Sawyer*, 176 F. 2d 868 (C.A. D.C.), affirming, *per curiam*, *United States Graphite Co. v. Harriman*, 71 F. Supp. 944, certiorari denied, 339 U.S. 904.

²For the Court's convenience this opinion is printed in Appendix B, *infra*, pp. 22-35.

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In that case, the United States Graphite Company, which had also received a 35 percent certificate of the type here in issue, sought to compel the Administrator of the Civilian Production Administration—the then certifying officer—to issue a 100 percent certificate, giving as its reason the same ground alleged in the instant case below, to wit, that the certifying officer had no power under the statute to make partial certifications.³ The District Court refused to issue the writ, stating that the certifying agency had issued the 35 percent certificate in accordance with its statutory discretion. The District Court decision was affirmed *per curiam* by the Court of Appeals for the District of Columbia, with Judge Miller filing a lengthy dissent on the ground that the statute did not give the certifying agency any authority to issue less-than-100 percent necessity certificates.

Subsequently, the Wickes Corporation, which had taken over the operation of the Graphite Company in the course of a corporate merger, raised the same issue again, but this time by way of a tax suit for refund in the Court of Claims. That court, while recognizing (p. 621) that “Substantially the same questions” had been involved in the *Graphite* case, reached the contrary conclusion, expressing its agreement with Judge Miller’s dissent rather than with the majority of the Court of Appeals. “In the circumstances [of our disagree-

³ There was also another issue in that case which is not now directly relevant.

ment with the District Court and the Court of Appeals of the District of Columbia]”, said the Court of Claims (p. 621), “we are, naturally, skeptical of the correctness of our conclusions.” Chief Judge Jones dissented. It is the reasoning in this *Wickes* decision of the Court of Claims which was adopted as the basis of the decision below.

It is therefore evident that, while there is a procedural difference between the *Graphite* case on the one hand and the *Wickes* and instant cases on the other, in that the former was a mandamus action while the latter were suits for refund, the decisions are completely irreconcilable in principle. The majority in the *Wickes* case explicitly stated its agreement with Judge Miller's dissent in the *Graphite* case; and Chief Judge Jones, in his dissent in the *Wickes* case, relied completely on the District Court and Court of Appeals majority in the *Graphite* case. Moreover, if, as the Court of Claims concluded, the certifying agency had no power to issue a less-than-100 percent certificate, and the taxpayer were automatically entitled to amortize the full cost once a necessity certificate had issued, then of course it would follow that a writ of mandamus would lie to compel the purely ministerial action of changing the figure on the certificate from 35 percent to 100 percent. Yet the District Court and Court of Appeals for the District of Columbia expressly refused to issue such a writ since they concluded that the certifying agency had acted within its statu-

tory discretion in limiting the certificate to 35 percent.

2. In view of the conflict which existed after the Court of Claims' *Wickes* decision, the Government contemplated filing a petition for certiorari. However, the Internal Revenue Service concluded at that time that the decision did not appear to be one of general importance,⁴ and it was consequently decided not to file a petition. Subsequently, as more cases began to appear at the administrative level, the Internal Revenue Service announced that it would not follow the *Wickes* decision since it had no statutory authority to vary the percentage certified to it by the duly designated certifying agency. Rev. Rul. 54-214, 1954-1 Cum. Bull. 298.

Following the decision below, in which a tax refund of more than \$5,000,000 is involved, the Internal Revenue Service was requested to undertake a complete survey of the pending cases in order to determine whether the magnitude of the problem warranted its presentation to this Court. This survey has revealed that there are currently

⁴ The Internal Revenue Service informed the Department of Justice that it did not have any claims for refund pending at that time under the World War II statute, and the subsequent statutory provision applicable to years beginning with 1950 (Section 124A of the Internal Revenue Code of 1939, as added by Section 216(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906) contains language (Section 124A(e)(1)) expressly designed to assure that that statute would not receive the construction which has been placed on the prior statute by the Court of Claims in this and the *Wickes* cases.

pending 39 cases involving this same problem, eight of them in the courts, and 31 of them at the administrative level. The total amount of revenue at stake in all cases is approximately \$62,000,000, three cases besides the instant one involving amounts in excess of \$5,000,000.⁵ All in all, approximately 80 percent of the necessity certificates issued by the War Production Board were partial certificates of the type here in issue, and all of these would be invalidated under the decision below.⁶ Although, as pointed out in footnote 4, *supra*, the present problem cannot arise under the statutory provisions enacted for years beginning with 1950, in the interest of removing the cloud from all these World War II certificates as well as in view of the large number of pending cases and the very substantial revenue involved, it is urged that this Court review the decision below.

⁵ Of course, some undeterminable portion of this sum would not have been paid in taxes apart from the decision below since the taxpayers holding these partial certificates would normally have been entitled to ordinary depreciation deductions on the uncertified portion of the construction or to a recovery of their investment in some other way. Generally, however, this would have occurred at lower tax rates.

⁶ S. Rep. No. 440, Part 2, 80th Cong., 2d Sess., p. 11. For an elaboration of the Board's partial certification policy see the War Production Board memorandum "Criteria for Preparation of Recommendations for Necessity Certificates" of March 8, 1944, which is reproduced in *United States Graphite Co. v. Sawyer*, No. 532, October Term, 1949, Record, pp. 81-87. See also S. Rep. No. 440, Part 2, 80th Cong., 2d Sess., p. 11, where the Special Committee Investigating the National Defense Program scored the War and Navy Departments for their failure to use such partial certifications in cases where the plants in question had substantial post-war utility.

3. For purposes of this petition, it is not necessary to review in detail the economic conditions which gave rise to the War Production Board's partial certification policy. Suffice it to say that by summer 1943, the initial purpose of the rapid amortization law—to stimulate private industry's contributions to the defense effort—had been largely fulfilled, and it was therefore decided that a gradual brake on further expansion was desired.⁷ Accordingly, the certifying agency began to issue less-than-100 percent necessity certificates, as well as to require that all further construction or expansion of facilities be approved in advance in order to qualify for the amortization privilege.⁸

When dealing with an administrative agency's power to decide a difficult and delicate question such as the extent to which a given facility is necessary in the interest of national defense, it would be natural, in the absence of some specific limitation in the statute, to assume that Congress intended to give the agency the widest discretion in the exercise of its function. In the present statute there not only is no such limitation; there is an express authorization of flexible administration. Thus Section 124(f) (Appendix A, *infra*, pp. 15-16) provides that in computing the adjusted basis of

⁷ See the testimony of Byron D. Woodside, Director of the Business Expansion Office of the Defense Production Administration. 3 House Hearings before Committee on Ways and Means, 82d Cong., 1st Sess., Revenue Revision of 1951, p. 2667.

⁸ 8 Fed. Register 13824 (October 5, 1943).

an "emergency facility" for the purposes of determining the annual amortization deductions:

(1) There shall be included *only so much of* the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later the WPB] has certified as necessary in the interest of national defense during the emergency period * * *.

[Emphasis added.]

It was this statutory provision which was squarely relied upon by Judge Pine and by the Court of Appeals majority which affirmed him in the *Graphite* case, as well as by Chief Judge Jones dissenting below. Moreover, if there is any ambiguity in the wording of the statute, it is completely dispelled by Section 29.124-6 of the applicable Regulations (Appendix A, *infra*, pp. 16-18) which specifically envisions partial certifications of the type here issued. (See the example of a 50 percent certificate cited in the Regulations.)

The Court of Claims stated in the *Wickes* case (p. 619) that—

the [War Production] Board's only function was to determine whether or not facilities answered the description of the statute, i.e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board

to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute.

(Appendix B, *infra*, p. 29.) But this statement seems to lose sight of the fact that such a necessity determination is not always susceptible of a "yes" or "no" answer. Particularly when the stimulative purpose of Section 124 is kept in mind, it is apparent that the question to be asked by the certifying agency is not so much "Is or is not this facility necessary in the interest of national defense," but rather "If the facility is necessary at all, *how necessary* is it in light of present economic conditions?" and "How much of the cost of the facility is properly allocable to the necessity of national defense?"⁹

In the *Graphite* and *Wickes* cases the taxpayer also cited some legislative history, referred to in Judge Miller's dissent in the *Graphite* case, which was claimed to show that Congress did not intend the certifying agency to have the discretion in question. It does not seem appropriate at this point to go fully into this subject. However, all that the legislative history shows is that Congress

⁹ It must be recalled that in view of the high surtaxes prevailing at the time, a 100 percent amortization certificate meant that the Government was effectively subsidizing 80 to 90 percent of the cost of the facility.

The present case is illustrative. The decision of the Court of Claims adds approximately \$7,300,000 to the amortizable basis of this property, and, for the taxable years involved, rapid amortization instead of ordinary depreciation deductions, results in a reduction in taxes of more than \$5,000,000.

intended the process of amortizing the certified amount to be automatic, once a necessity certificate had been issued. But this legislative history is of no aid in answering the question here at issue—the agency's power to issue less-than-100 percent certificates. And unless it is held that the agency had no such power, then it is the certified amount of 35 percent, and not an imputed amount of 100 percent, which must be amortized. Certainly it cannot be presumed that Congress intentionally tied the certifying agency's hands so as to confine its discretion in this important determination to an "all or nothing" choice.

All this, of course, merely underscores the undesirability of reviewing, by way of collateral attack in a tax action, policy judgments of a wartime administrative agency, and the fact that Congress undoubtedly never intended that the Commissioner of Internal Revenue should be permitted or required to go behind the necessity certificate issued to him by the duly designated certifying agency. See *Arkansas-Oklahoma Gas Co. v. Commissioner*, 201 F. 2d 98, 103 (C.A. 8th); Rev. Rul. 54-214, *supra*.

4. But even if the Court of Claims properly concluded that the certifying agency had no power under the statute to issue less-than-100 percent certificates, it by no means follows that the court itself was authorized to enter judgment as if a 100 percent certificate had been issued in this case. There is nothing in this record to show that the War Production Board, had it been faced with

such a choice under the prevailing economic conditions, would have issued a 100 percent certificate to the taxpayer rather than none at all. In any event, Congress undoubtedly intended the Board and not the courts to weigh the relevant factors, and it was improper for the court below to "exercise an essentially administrative function." *F. P. C. v. Idaho Power Co.*, 344 U.S. 17, 21. "[T]he guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare." *Id.*, p. 20; see also *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194.

CONCLUSION

The Court of Claims has made an erroneously restrictive interpretation of Section 124 of the Internal Revenue Code of 1939, in conflict with that rendered by the Court of Appeals for the District of Columbia. The problem is an important one affecting a large number of currently pending cases and involving a very sizeable amount of revenue. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST, 1955.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(t) [as added by Sec. 301, Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Amortization Deduction*.—The deduction for amortization provided in section 124.

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 124 [as added by Sec. 302, Second Revenue Act of 1940, *supra*]. AMORTIZATION DEDUCTION.

(a) [as amended by Sec. 155(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule*.—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the

period. Such adjusted basis at the end of the month shall be computed without regard to the **amortization deduction** for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23(1), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * *

(e) [as amended by Sec. 155(d) of the Revenue Act of 1942, *supra*] *Definitions.*—

(1) *Emergency Facility.*—As used in this section, the term “emergency facility” means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

* * * *

(f) [as amended by Sec. 155 (e), Revenue Act of 1942, *supra*] *Determination of Ad-*

justed Basis of Emergency Facility.—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(26 U.S.C. 1952 ed., Sec. 124.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

~~SEC. 29.124-6~~ [as amended by T. D. 5432, 1945 Cum. Bull. 180]. *Adjusted basis of emergency facility.*—

(a) *In general.*—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility, in that it shall

be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense, during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the

entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of \$500,000, of which \$300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore \$300,000. For depreciation of the remaining portion of the cost (\$200,000), see section 29.124-7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the same facts as in the example in the preceding paragraph, except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of \$300,000, or \$150,000.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 218-54

(Decided March 1, 1955)

THE OHIO POWER COMPANY

v.

THE UNITED STATES

Mr. J. Marvin Haynes for the plaintiff. *Messrs. Miller, Haynes, Tyree and Sheppard* were on the brief.

Mr. Homer R. Miller, with whom was *Mr. Assistant Attorney General H. Brian Holland*, for defendant. *Mr. Andrew D. Sharpe* was on the brief.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR
SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover \$5,885,388.22 which it claims it overpaid in income and excess profits taxes for the years 1943, 1944 and 1945.

The plaintiff is an Ohio corporation which as a public utility manufactures and sells electrical energy. During World War II the demand upon it for additional service made it necessary for it to expand its facilities. Pursuant to Section 124 of the Internal Revenue Code it filed with the Sec-

retary of War, who was then the proper certifying authority, an application for a Necessity Certificate with respect to the construction of a new plant, and a transmission line from the new plant to one of its substations 55 miles away. The plaintiff claimed a cost of \$11,246,256.54 for purposes of amortization.

The authority to grant Necessity Certificates was, in December 1943, transferred to the Chairman of the War Production Board, and in October 1945, was again transferred to the Administrator of the Civilian Production Administration. In November 1944, a Necessity Certificate was issued, addressed to the Commissioner of Internal Revenue, and relating to the plaintiff's new construction. It certified that the facilities were necessary in the interest of national defense during the emergency period, up to 35 percent of the cost attributable to the construction thereof. Because of the 35 percent limitation in the Certificate, the Commissioner of Internal Revenue permitted the rapid amortization of only 35 percent of the plaintiff's costs of construction, instead of 100 percent of those costs which, the plaintiff claims, he should have permitted.

In the case of *Wickes Corporation v. United States*, 123 C. Cls. 741, we had the same problem. We discussed at length the history and the policy of the statute permitting rapid amortization. We concluded that the attempted 35 percent limitation inserted in the Necessity Certificate in that case

was invalid, as a contradiction of the statute. What we said in that case is applicable to this one.

Defendant's motion for summary judgment is denied and plaintiff's motion is granted.

The plaintiff is entitled to recover, with interest as provided by law. Entry of judgment is suspended to await the filing by the parties of a stipulation showing the amount due.

It is so ordered.

LARAMORE, *Judge*; WHITAKER, *Judge*; and LITTLETON, *Judge*, concur.

JONES, *Chief Judge*, dissenting:

I think the provisions of the Internal Revenue Code clearly authorized the executive officials to limit the amount of rapid amortization deduction.

Section 124 (f) (1) of the Code is as follows:

(f) Determination of adjusted basis of emergency facility.

In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during

the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President. [26 U.S.C. 124, 1952 Ed.]

Section 124 (f) (3) (C) of the Code provides specifically that no amortization deduction shall be allowed in respect of any emergency facility for any taxable year "unless a certificate in respect thereof under paragraph (1) shall have been made * * * "

Since the statute clearly authorizes the limitation, and the certificate actually limits the amortization to the 35 percent and that amount has been allowed, I would dismiss the petition. *United States Graphite Co. v. Harriman*, 71 F. Supp. 944; *United States Graphite Co. v. Sawyer*, 176 F. 2d 868 (certiorari denied).

IN THE UNITED STATES COURT OF CLAIMS

No. 50224

(Decided December 2, 1952)

THE WICKES CORPORATION

v.

THE UNITED STATES

Mr. N. Barr Miller for the plaintiff. Messrs. Haynes & Miller, F. Eberhart Haynes and Oscar L. Tyree were on the briefs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Charles S. Lyon* for the defendant. *Mr. Andrew D. Sharpe* was on the briefs.

OPINION

MADDEN, Judge, delivered the opinion of the court:

The plaintiff seeks to recover from the Government excess profits taxes in the amount of \$43,610.29 for the year 1944 and of \$93,146.01 for the year 1945. The taxes were paid by The United States Graphite Company. That company was later merged into the plaintiff company, which succeeded to its rights to the claims herein asserted. The instant dispute depends upon the proper interpretation and application of the statutes permitting a corporation which built or expanded its plant or equipment in order to increase wartime production to amortize the cost of such plant or equipment over a short period of years, by deductions from its income for tax purposes.

Section 23 (t) of the Internal Revenue Code provided, during the years here in question, for the deduction from gross income of "the deduction for amortization provided in Section 124." Section 124 is, therefore, the key section in this case. That section, in subsection (a), said that a taxpayer at his election was entitled to a deduction on the basis of the amortization of any emergency facility during a period of sixty months. It referred to

paragraph (e) for the definition of an emergency facility. The first sentence of subsection (e) says:

As used in this section, the term "Emergency facility" means any facility, land, building, machinery or equipment, or part thereof, the construction, reconstruction, erection, installation or acquisition of which was completed after December 31, 1939, and with the respect to which a certificate under subsection (f) has been made.

Subsection (f) said:

In determining, for the purposes of subsection (a) or subsection (h) the adjusted basis of an emergency facility (1) There shall be included only so much of the amount otherwise constituting such adjusted basis¹ as is properly attributable to such construction, reconstruction, erection, installation or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

¹ The parties are agreed that the "adjusted basis" of the property here in question was its cost.

For brevity, we refer to the plaintiff's predecessor, The United States Graphite Company, to whose rights the plaintiff has succeeded, as the plaintiff. It was, during the Second World War, engaged in the manufacture of graphitar, which was used by the armed services and the Maritime Commission in the construction of aircraft, ships and other equipment used in the prosecution of the war. In 1943 the Government's demand for graphitar exceeded the capacity of the plaintiff's plant and facilities. Procurement officials encouraged the plaintiff to enlarge its facilities, and the plaintiff, prior to June 27, 1943, made plans to do so. It was granted high priorities for the obtaining of the materials, supplies and equipment needed for the enlargement.

On June 27, 1943, the plaintiff, in order to obtain the benefits of the rapid amortization provided for in Section 124 of the Internal Revenue Code, applied to the Secretary of War for a "necessity certificate" covering its proposed new factory building. That certificate was granted on October 28, 1943, and is not here in question. When the building was under way, the plaintiff applied to the War Production Board for preference ratings or priorities to assist it in obtaining the machinery and equipment for the new plant. These applications were made from October 7 to December 10, 1943, and were promptly granted. The machinery and equipment were obtained by the plaintiff and installed in the factory on various dates between December 28, 1943, and December 15, 1944.

By Executive Orders issued in December 1943, and March 1944, the President transferred to the Chairman of the War Production Board the functions which had formerly been exercised by the Secretary of War and the Secretary of the Navy, with regard to the issuance of necessity certificates. On May 29, 1944, the plaintiff duly filed an application for such a certificate covering machinery and equipment having a total estimated cost of \$255,002.79. To the application was appended a list of the items included. On July 17, 1944, the War Production Board advised the plaintiff by letter that it had been determined that the machinery and equipment listed in the plaintiff's application were eligible for tax amortization on a 35% basis, provided that the items were to be acquired after the date of the letter. The Board's letter said that a Certificate of Necessity would be issued, as of July 17, 1944, after the Board had received a schedule in affidavit form stating, with respect to each item, that it had not been acquired before July 17, 1944.

The requested affidavit was filed by the plaintiff on July 27, 1944. It showed, of course, that some of the facilities had been acquired before July 17, 1944, and that the others had been or would be acquired after that date. On or about July 31, 1944, but as of July 17, 1944, the Board issued to the plaintiff a necessity certificate stating that the facilities described in the attached Appendix A were "necessary in the interest of national defense during the emergency period, up to 35% of the

cost" thereof. The attached Appendix A was the list which the plaintiff had submitted with its affidavit. The items thereon shown to have been received before July 17, 1944, were, however, crossed over with Xs made by a red pencil. On April 2, 1946, the Civilian Production Administration, which had, apparently, succeeded to the functions of the War Production Board issued an amendment to the Necessity Certificate, which amendment listed in detail the actual cost of the facilities received before and after July 17, 1944. It showed that the cost of those received before that date was \$77,195.99, and of those received after that date was \$140,031.44. Those figures were correct, and the present controversy concerns only the application of the amortization law to those amounts.

At the request of the plaintiff for a statement of the reasons for its action, the Civilian Production Administration on August 12, 1946, wrote the plaintiff that it was the Administration's policy, in cases where the facilities to be acquired would be useful in post-war operations, to limit necessity certificates to 35% of the cost of the facilities. The plaintiff had, earlier, been orally advised that the 35% figure had been selected because that was the estimated excess of the cost of the facilities in wartime over what would have been their peacetime cost.

The taxing authorities, in imposing excess profits taxes upon the plaintiff, allowed it to deduct accelerated amortization upon only 35% of the cost of the facilities acquired after July 17, 1944, and no such amortization at all upon those acquired be-

fore that date. The plaintiff contends that it should have been allowed to deduct accelerated amortization upon the full cost of both kinds of facilities.

We consider first the facilities acquired after July 17, 1944. As to those, War Production Board certified that they were eligible for accelerated amortization for tax purposes under Section 124. The plaintiff says that the Board had no power to put the 35% limit on the amount of the cost of the facilities on which amortization should be computed. We agree with the plaintiff. When Congress took the drastic step of conferring the important tax advantage of rapid amortization upon those private enterprises which would invest their own money in expanding their facilities to increase wartime production, it knew that in some cases the enterprises would have, at the end of the war, facilities still useful but which had been paid for, to a considerable extent, by reductions in income and excess profits taxes. See Hearings before the Senate Committee on Finance on the Second Revenue Act of 1940, 76th Cong. 3d Sess. (1940) 124, 125. Yet Congress provided for their amortization over a period of five years. When the War Production Board attempted to limit to 35% the proportion of the cost which could be so amortized, it was, in effect saying that the actual cost could be amortized, during the first five years, only to the degree which would contemplate its total amortization in about fifteen years. That was a contradiction of the statute. The Board, as we have seen, decided upon the 35% figure because that was its estimate of the ex-

cess cost of acquiring the facilities in wartime. But there is no suggestion in the statute or its legislative history that such a consideration had any relevance. The purpose of the statute was to induce private enterprises to acquire facilities for which they would have had no need, except for the pressure of wartime production. According to the Board's reasoning, if price and wage controls had kept the wartime cost of the facilities down to the peacetime cost, no use whatever would have been made of Section 124. But an enterprise does not spend its money to acquire unneeded facilities, or those which will be needed for only a short time, just because it can acquire them at normal prices.

We think that the Board's only function was to determine whether or not facilities answered the description of the statute, i.e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute. The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would, perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not "necessary in the interest of national defense during the emergency period," would have said to itself, "If we make a true statement, it will cost the Government X dol-

lars in lost revenue. If it would cost the Government only Y dollars, we would tell the truth. But since it will cost X dollars, we will not tell the truth."

The Government points to the language of Section 124(f), hereinbefore quoted which says that there shall be included for rapid amortization purposes "only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction * * * or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary, etc." The Government says that this language authorized the certifying authority to certify only a part of the cost of the facilities, in his discretion. We think that this is a misreading of the statute. Subsection (e) (1) of Section 124, in defining the term "emergency facility" gives a somewhat complicated formula for determining the time at which the facility must have been acquired in order to be eligible for accelerated amortization. Apparently December 31, 1939, was the date after which, in any event, the facility must have been acquired in order to be so eligible. But even if acquired after that date, application for a necessity certificate had to be made within six months after its acquisition. And if some of the facility was acquired more than six months before the date of application, and the rest within six months, the latter amount would be eligible. Thus the words "only so much of, etc." are needed, and have a rational application without construing them as authorizing

the certifying authority to contradict the purpose of the statute.

As to the facilities acquired before July 17, 1944, the problem is somewhat different. It will be remembered that the plaintiff applied for its certificate of necessity on all of its facilities on May 29, 1944. The earliest date at which it had acquired any of the facilities was December 28, 1943, so that its application was within six months of the acquisition. On July 17, 1944, the Board wrote the plaintiff that it had made a determination that all the facilities were necessary in the interest of national defense, provided the date of their acquisition was subsequent to the date of the letter. The Board requested the information, in affidavit form, hereinbefore described, and, having received it, issued its certificate, attaching the entire list, but having crossed out the items which were acquired before July 17, 1944.

The Government points to Section 124 (f) (1) which says that one gets accelerated amortization upon facilities which either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense. It says that as to the facilities acquired before July 17, 1944, no certificate was issued, and that's the end of it. No certificate, no amortization. Since the Board's letter of July 17 stated that all the facilities listed were necessary, and since the plaintiff's application for its certificate was filed within the six months statutory period, the question arises,

of course, why the Board refused to issue the certificate upon at least the 35% basis.

On March 22, 1944, the Board, with the approval of the President, issued the following regulation (8 Fed. Reg. 2492, March 4, 1944):

Section 4. Application must be filed and determination made before construction is begun or date of acquisition. The construction, reconstruction, erection, installation, or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation, or date of acquisition.

The plaintiff contends that the regulation is invalid. When Section 124 was originally enacted, in the Second Revenue Act of 1940, approved October 8, 1940, subsection (f) (3) provided that a certificate of necessity would be ineffective unless obtained before the facility was acquired. By Joint Resolution, approved January 31, 1941, subsection (f) (3) was amended to provide that certificates of necessity would be valid if applications for them were made within sixty days after the acquisition of the facility. Again, in October 1941, by House Joint Resolution 235, Public Law 285, 77th Cong., 1st Sess., Ch. 464, Congress again amended subsection (f) (3) and enlarged the period within which application for a certificate might be filed from sixty days to six months after the acquisition of the facility.

Congress having specifically and repeatedly dealt with the question of when applications might be filed, and having each time enlarged the period, we think that the regulation quoted above, which in effect discarded the amendments made by Congress and put into effect the requirements of the original statute, was invalid. We think, therefore, that the plaintiff having applied within six months for its certificate, it was the duty of the certifying officer to determine the fact as to whether the facilities were necessary in the interest of national defense, and to certify or refuse to certify accordingly. The Chairman of the Board did determine that the facilities were necessary, and issued the letter of July 17 so saying. He then refused to issue the formal certificate solely because of the regulation which we have said above was invalid. He having put his mind upon the question of fact, which we think was his only function under the statute, and having answered that question in favor of the plaintiff, it was his duty to issue the certificate, and we feel certain that he would have done so but for the invalid regulation. His refusal, therefore, amounted in law, though not in fact, to an arbitrary refusal to perform his statutory duty. We have no reason to suppose that the enormous tax benefits which Congress, wisely or not, sought to confer by the enactment of Section 24 were to be bestowed or withheld at the arbitrary will of the executive. Equity regards that as done which ought to have been done. We do not have here the problem of deciding, contrary to the de-

cision of the official in which the statute lodged the power of decision, that the facilities in question were necessary. He decided that they were. We merely append the proper legal consequences to his decision by disregarding the invalid regulation which prevented him from putting his factual decision in legal form. We conclude, therefore, that the facilities acquired by the plaintiff before July 17, 1944, were eligible for accelerated amortization, and that the plaintiff is entitled to that amortization.

Substantially the same questions involved in the instant case were presented to the United States District Court for the District of Columbia in *The United States Graphite Co. v. Secretary of Commerce*, 71 F. Supp. 944. That was a suit by the plaintiff's predecessor, the Graphite Company, to compel the issuing authority to issue the certificates of necessity which would have entitled that company to the tax deductions which the plaintiff claims here. The District Court, Judge Pine sitting, denied relief. The United States Court of Appeals affirmed, 176 F. 2d 868, upon the opinion of Judge Pine. Judge Wilbur K. Miller of the Court of Appeals dissented, in an opinion with which we agree. The Supreme Court denied certiorari. 339 U.S. 904. The Government does not claim that that litigation made the dispute a *res adjudicata*. In the circumstances we are, naturally, skeptical of the correctness of our conclusions.

The plaintiff is entitled to recover. Entry of judgment will be suspended to await the filing by

the parties of a stipulation showing the amount due the plaintiff, according to our findings and opinion.

It is so ordered.

HOWELL, *Judge*; WHITAKER, *Judge*; and LITTLETON, *Judge*, concur.

JONES, Chief Judge, dissenting in part.

I agree that plaintiff should recover but the amount should be limited to 35 percent of the cost of the facilities.

I think the provision of Section 124 (f) (1) of the Internal Revenue Code which is as follows:

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such * * * acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President. * * *

clearly authorized the executive officials to limit the amount of the amortization. *United States Graphite Co. v. Harriman*, 71 Fed Supp. 944. *United States Graphite Co. v. Sawyer*, 176 F. 2d 868 (*certiorari* denied).

[Finding of Fact Omitted]

IN THE UNITED STATES COURT OF CLAIMS

No. 218-54

THE OHIO POWER COMPANY

v.

THE UNITED STATES

ORDER

On March 1, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the court's opinion.

On March 25, 1955, said stipulation was filed signed on behalf of the plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General H. Brian Holland, in which it is stated that in accordance with the court's decision there is due plaintiff the amounts set out below, together with interest as provided by law.

NOW, THEREFORE, IT IS ORDERED this thirtieth day of March, 1955, that judgment be and hereby is entered for plaintiff in the following sums together with interest on each as provided by law:

1943—Two million, sixty-five thousand seven hundred sixty-seven dollars and twenty-five cents (\$2,065,767.25) of excess profits.

1944—One million, two hundred fifty-one thousand six hundred eighty-seven dollars and sev-

enty-one cents (\$1,251,687.71) of excess profits,

1945—Two million, five hundred sixty-seven thousand nine hundred thirty-three dollars and twenty-six cents (\$2,567,933.26) of income taxes.

By the Court

MARVIN JONES,
Chief Judge.

[caption omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 12th, 1955.

EARL WARREN,
Chief Justice of the United States.

Dated this 18th day of June, 1955.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

**MOTION OF THE UNITED STATES FOR LEAVE TO FILE A
PETITION FOR REHEARING**

The United States, by its Solicitor General, moves that this Court grant leave to file a second petition for rehearing of the denial by this Court of a petition for a writ of certiorari to the United States Court of Claims.

The accompanying petition sets out intervening circumstances which represent substantial grounds for granting the petitions for rehearing and for a writ of certiorari.

The petition for a writ of certiorari was denied on October 17, 1955 (350 U. S. 862), and a peti-

tion for rehearing was denied on December 5, 1955 (350 U. S. 919). The Court's action was thus taken more than 25 days prior to this petition for rehearing.

This Court has granted petitions for rehearing which were filed after the expiration of the time prescribed by the Rules of this Court. See, for example, *Clark v. Manufacturers Trust Co.*, 337 U. S. 953, 338 U. S. 241, 242; *Stone v. White*, 300 U. S. 643. An incomplete check reveals that the Court has granted out-of-time petitions for rehearing at least twenty-five times in the last twenty years. It is plain therefore that the Court has not divested itself of the power to consider such petitions for rehearing and that, where meritorious grounds exist, leave to file a successive petition for rehearing may be granted even though the petition for rehearing is not filed within the period set forth in Rule 58 in which petitions for rehearing may be filed as of right. We submit that the accompanying petition for rehearing should be accepted for filing and granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1956.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITION FOR REHEARING

The petition for a writ of certiorari in this case stated the following two questions:

1. Whether the War Production Board in issuing necessity certificates for accelerated amortization had authority to certify only part of the cost of a new facility.

2. Assuming the Board had no statutory authority to issue partial certifications, whether it was proper for the Court of Claims to allow the taxpayer to amortize the full cost of the facility, even though the certifying agency had refused to do so.

In *Commissioner v. National Lead Co.*, 230 F. 2d 161, decided subsequently to the denial of certiorari in this case (350 U. S. 862) and to the denial of a petition for rehearing (350 U. S. 919), the Court

of Appeals for the Second Circuit held, contrary to the decision of the Court of Claims in this case, that a taxpayer had no standing to make a collateral attack on a certificate issued by the War Production Board for part of its costs by seeking in tax litigation an amortization deduction based on 100 percent of the cost of the property. It should have sought review through an action against the War Production Board for mandamus or for an injunction. Consequently, while the Second Circuit found it unnecessary to pass on the first question stated in the petition for a writ of certiorari in this case, it answered the second question in a manner directly contrary to the decision of the Court of Claims.

After the decision in *National Lead, supra*, the Court of Claims again passed on the identical question in *Allen-Bradley Co. v. United States*, decided April 3, 1956. Although the court "reconsidered [its] earlier decisions in the light of the contrary decision" in *National Lead*, it decided to "adhere to the views expressed" in the present case.

The United States is filing a petition for a writ of certiorari in the *Allen-Bradley* case, asking this Court to resolve this conflict in decisions. We understand that a petition for a writ of certiorari will be filed by the taxpayer in *National Lead*. If this Court should grant these petitions, it would seem entirely appropriate that the present case

should also be reviewed, in order that consistent decisions may be entered in all three cases.

CONCLUSION

It is respectfully submitted that this petition for rehearing and the petition for a writ of certiorari should be granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1956.

As required by Rule 58, I certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in that Rule.

SIMON E. SOBELOFF,
Solicitor General.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, PETITIONER

v.

THE OHIO POWER COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF CLAIMS*

**REPLY BRIEF ON MOTION OF THE UNITED STATES FOR
LEAVE TO FILE A PETITION FOR REHEARING AND
PETITION FOR REHEARING.**

I

The brief filed by the taxpayer in response to the motion of the United States for leave to file a petition for rehearing raises an important preliminary procedural question which, in addition to the substantive tax issues in this case, warrants review and resolution by the Court. This question relates to the jurisdiction and powers of this Court; and its definitive settlement in this case would afford guidance to the bar and avoid unnecessary future litigation.

The taxpayer asserts (pp. 2-13) that it would be contrary to this Court's Rule 58 (4) to grant the Government's motion for leave to file an untimely and successive petition for rehearing of the prior denial of certiorari. Pointing to 28 U. S. C. 452 and suggesting that this Court may have been deprived of any jurisdiction to grant petitions or motions which are filed out of time (see Wiener, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20, 85-86 (1954)), the taxpayer contends that, at the very least, Rule 58 (4), when read in conjunction with 28 U. S. C. 452 means that (p. 6) "this Court should no longer grant consecutive or out-of-time petitions for rehearing on the allegation of a belatedly developed conflict of decisions among the circuits."

As the taxpayer recognizes, prior to the adoption of the present Rules, this Court did not consider itself without power to grant motions for leave to file untimely petitions for rehearing and, in appropriate circumstances, particularly when justified by intervening events, such as the subsequent development of a conflict in decisions, such motions were allowed and certiorari granted despite a prior denial. Commentators have expressed doubt that the Court intended by Rule 58 (4) to deprive itself of discretionary authority to consider and grant such motions. See Stern and Gressman, *Supreme Court practice* (2nd Ed.,

II

The taxpayer asserts (pp. 15-22) that there is no conflict to be resolved by this Court, it being contended that the decision of the Second Circuit in *Commissioner v. National Lead Co.*, 230 F. 2d 161, is distinguishable since the necessity certificates for less than 100 percent which were issued in that case might have reflected an administrative determination that the entire facilities were not necessary to the national defense, while here the certificates were issued for less than 100 percent because the facilities possessed a post-war utility.

Actually, the ~~certificates~~ which were issued in both cases appear to be identical. And, in *National Lead*, both the Government and the taxpayer presented the case to the Court of Appeals as one where the certificates were issued for less than 100 percent of cost only because of the policy of the administrative agency to reflect post-war use. (Govt. Br. 5-6; Pet. Br. 2.) Neither side even suggested that there was any difference between that case and this one. Nor is there anything in the opinion of the Court of Appeals which intimates that it took a different view of the facts of the case than the parties had presented. And, significantly, the Court of Claims has recognized that the *National Lead* decision conflicts with its own decisions, including its decision in the present case.

Furthermore, the crux of the conflict lies in the fact that the Second Circuit refused to permit a collateral attack, in the tax proceeding, on the administrative decision in issuing partial certificates of necessity. The Court of Claims did precisely the contrary. Consequently, it would make little difference, so far as both courts are concerned, whether the administrative refusal to issue a 100 percent certificate was based on one ground rather than another. Under these circumstances, a conflict in decisions exists.

III

A question of jurisdiction has also been raised, the taxpayer contending (pp. 13-15) that the original petition for a writ of certiorari was untimely. The issue here involves a determination of when the final judgment of the Court of Claims was entered, so as to start the statutory period under 28 U. S. C. 2101 (c) within which a petition for a writ of certiorari may be filed.

On March 1, 1955, the Court of Claims promulgated its opinion in this case in which it granted the taxpayer's motion for summary judgment and denied the motion for summary judgment filed by the United States. The opinion stated that "Entry of judgment is suspended to await the filing by the parties of a stipulation showing the amount due." On March 30, 1955, the Court of Claims entered an order which recited that it had "rendered an opinion" on March 1, 1955, holding

that the taxpayer was entitled to recover "but suspended the entry of judgment" pending a stipulation of the parties showing the amount due. After reciting that such a stipulation had been filed, the order of March 30, 1955, provided "that judgment be and hereby is entered" for the taxpayer in the amounts stated.

The critical question here is not when the Court of Claims arrived at a judgment which in common parlance was final, but rather when did it *enter* that judgment, since the period for filing a petition for certiorari begins to run under 28 U. S. C. 2101 (c) only upon "entry" of the "judgment". If the rendition of the opinion and decision of the Court of Claims on March 1, 1955, is considered the "entry" of "judgment", then the petition in this case was untimely. However, if no judgment was entered by the Court of Claims until March 30, 1955, then the extension was granted within the 90-day period and the petition was timely.

While Rule 38 (c) of the Court of Claims provides that "where the court determines that a party is entitled to recover and the amount of recovery is reserved for further proceedings, the judgment on the question of the right to recover shall be final", its rules explicitly show that the rendition of the judgment and its formal entry do not always coincide. Rule 52 states that the clerk shall "enter judgment" when "the Court directs the entry of judgment" and that the "notation of

a judgment on the docket * * * constitutes the entry of judgment."

Here the Court of Claims having specifically provided in its opinion that "the entry of judgment is suspended" and having thereafter entered an order directing that "judgment be entered," it would seem to be fairly obvious that the court cannot be deemed "to have entered" the judgment by the very order in which it stated that such entry is being "suspended".¹ Under such a view, the petition here was timely. See *Commissioner v. Estate of Bedford*, 325 U. S. 283, 284-288. The question concerning the time within which to file a petition from a judgment of the Court of Claims of the kind entered in this case was also raised earlier this term by the respondent in *United States v. Tanner* (No. 280, October Term, 1955), certiorari denied, 350 U. S. 842, and a discussion of the point is contained in the memorandum filed by the United States in response to the brief in opposition.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1956.

¹ Cf. *Calter v. United States*, 100 F. Supp. 970, 980, reversed, 344 U. S. 149, where the Court of Claims did not suspend the entry of judgment.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

THE UNITED STATES, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITION FOR REHEARING

The Solicitor General, on behalf of the United States, requests that this Court reconsider its order of October 17, 1955, denying the petition for a writ of certiorari, and that further consideration of this case be deferred pending the decision of a case now before the Court of Appeals for the Second Circuit involving the identical issue here presented.

As the principal reason for granting the petition in the instant case, we stated (Pet. 4-7) that the decision below was in conflict with the decision of the Court of Appeals for the District of Columbia in *United States Graphite Co. v. Sawyer*, 176

F. 2d 868, affirming, *per curiam*, *United States Graphite Co. v. Harriman*, 71 F. Supp. 944, certiorari denied, 339 U.S. 904. The taxpayer in its brief in opposition (pp. 10-12) denied the existence of a conflict, contending that the present case was a tax refund proceeding whereas the District of Columbia case was a mandamus action. The denial of the petition, despite the substantial sums involved in the numerous cases pending on this issue (Pet. 7-8), suggests that the Court may have agreed with the taxpayer that no direct conflict was presented.

The most recent decision involving the War Production Board's authority to certify only part of the cost of a new facility is that of the Tax Court in *National Lead Co. v. Commissioner*, 23 T.C. 988, where that court agreed with the interpretation of the Court of Claims herein and with Judge Miller's dissent in the *Graphite* case. Judge Oppen dissented, relying on majority decision in the *Graphite* case and the dissent of Chief Judge Jones of the Court of Claims in the instant case.

On September 14, 1955, the Commissioner filed a petition for review of the *National Lead* decision in the Court of Appeals for the Second Circuit, and the case is now pending there. Since both parties are anxious to obtain an early decision, the case will be expeditiously handled, and it is likely that there will be a decision by early next year. As pointed out in our petition, the District Court for the District of Columbia as well as a majority of the Court of Appeals for the District of Columi-

bia have adopted the interpretation for which we contend, and every decision on the question has been a divided one. These factors, we respectfully submit, make it more than a mere possibility that the Second Circuit may reverse the Tax Court, thus creating a square conflict with the decision below. In that eventuality, vacation of the order denying certiorari and issuance of the writ would be warranted (*Clark v. Manufacturers Trust Co.*, 337 U.S. 953, 338 U.S. 241; *Sanitary Refrig'r Co. v. Winters*, 280 U.S. 30, 34, fn. 1).

In filing this petition the Government is fully mindful of the considerations which ordinarily militate against rehearing. If this were an ordinary case, the Government would, of course, accept the finality of decision implicit in the denial of certiorari, and would not press for further consideration of the matter. However, we believe that the circumstances here presented are exceptional. As noted in the petition (pp. 7-8), there is a large number of pending cases involving this issue, and the total claims may run to more than 60 million dollars. Despite the denial of certiorari, these claims will continue to be asserted and contested. If a direct conflict of decisions should develop within the near future, prior to the expiration of the current term, the Court could definitely settle the question and thus avoid needless and protracted litigation in the lower courts. We submit that the interests of expeditious determination of the issue as well as protection of the revenue require that the instant case—particularly in view of the very

large tax refund involved—be kept open, to await the outcome of the pending *National Lead* case in the Second Circuit.¹

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

PHILIP ELMAN,
*Assistant to the
Solicitor General.*

ELLIS N. SLACK,
HILBERT P. ZARKY,

Attorneys.

NOVEMBER, 1955.

CERTIFICATE OF COUNSEL

As required by Rule 58, I certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in that rule.

SIMON E. SOBELOFF,
Solicitor General.

¹ Cf. *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 233, in which certiorari was granted "because of a conflict between the decision below [of the Court of Claims] and *Lewyt Corp. v. Commissioner*, 215 F. 2d 518, decided by the Court of Appeals for the Second Circuit." The *Olympic* petition for certiorari was filed on May 29, 1953; the *Lewyt* case was decided by the Second Circuit on July 14, 1954; and certiorari was granted in *Olympic* on October 14, 1954 (348 U.S. 808).

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF REHEARING

1. In *United States v. Allen-Bradley Company*, No. 78, decided January 22, 1957, this Court held that Section 124 (f) of the Internal Revenue Code of 1939, as amended, granted authority to the appropriate officials "to issue certificates, as in this case, certifying that only a part of the cost of essential wartime improvements was necessary to the national defense" (slip opinion, p. 6). The same holding was made in the companion case of *National Lead Co. v. Commissioner*, No. 124.

This case is identical with *Allen-Bradley* and *National Lead* in every relevant respect. The language of the certificate issued in this case, certifying that only a part of the cost of the property was necessary

to the national defense, is, in relation to the legal issues involved, the same as that in the certificates in the *Allen-Bradley* and *National Lead* cases. And, admittedly, the reasons which in this case prompted the administrators to issue a certificate for only a part of cost are precisely the same as those that led to the issuance of the partial certificates in the *Allen-Bradley* and *National Lead* cases, namely, that the property would possess post-war utility to the taxpayer.

Accordingly, the decisions in the *Allen-Bradley* and *National Lead* cases are controlling and compel the conclusion that here, too, the tax deductions are to be computed in accordance with the limitations contained in the certificate. Since the decision of the Court of Claims, allowing a deduction based on the full cost of the property in disregard of the limitations of the certificate, was based on an erroneous ruling of law (reiterated by it in *Allen-Bradley*), namely, that Section 124 (f) did not authorize the issuance of partial certificates, and since that holding has now been authoritatively rejected by this Court, reversal of its decision in the instant case is no less warranted than in *Allen-Bradley*.

The taxpayer contends, however, that this case is distinguishable from *Allen-Bradley* and *National Lead*; that those decisions are not controlling; and that "the decision below is plainly correct * * * and should not be disturbed".

The Government submits that the taxpayer's attempt to distinguish *Allen-Bradley* and *National Lead* is clearly futile. The asserted distinctions are, on their face, without significance. In essence, taxpayer

claims that, because it began the construction of the facilities, prior to October 5, 1943, and because paragraph 3 (a) of Executive Order 9406, 8 Fed. Reg. 16955, provided that applications with respect to such facilities should be governed by the Regulations of the Secretaries of War and Navy in effect prior to October 5, 1943, this case is essentially different from *Allen-Bradley* and *National Lead*, where the construction began after October 5, 1943. But this factual difference is of no consequence unless the taxpayer is also correct in its basic contention of law that the Board's action in issuing a partial certificate was in violation of the governing Regulations and the Executive Order.

It is now datum, as a result of the Court's decisions in *Allen-Bradley* and *National Lead*, that the statute granted authority to issue partial certificates. Taxpayer must therefore attempt to sustain the burden that, though authorized by statute, the certifying officials had, by Regulations, precluded themselves from exercising this authority prior to the promulgation of Executive Order 9406 and, if they had not, that the Executive Order prohibited them from exercising their statutory authority in situations where construction had begun prior to October 5, 1943, and where, as here, the application for a certificate was not filed until later (November 16, 1943). For the reasons briefly summarized below, we think it abundantly clear that this burden has not been, and cannot be, met.

(a) From the very beginning, those charged with responsibility recognized their statutory authority to

issue partial certificates in appropriate circumstances where they concluded that only part of the cost of a particular facility was necessary in the national defense. Thus, Section 5 (a), War Department Regulations, Issuance of Necessity Certificates, 7 Fed. Reg. 4233 (1942) stated that necessity certificates were conclusive evidence that the facilities were necessary in the interest of the national defense "up to the percentage therein designated * * *." And, except for the inclusion of the specific percentage, the certificate in this case, as in *Allen-Bradley* and *National Lead*, follows the identical language of Section 5 (a) of these Regulations, which were cited by this Court as showing that the administrative officials had consistently interpreted the statute as authorizing such partial certificates. (*Allen-Bradley*, slip opinion, p. 4, footnote 2.) And the Treasury Regulations, issued soon after the enactment of the Second Revenue Act of 1940, made it crystal clear that the administrators assumed that they possessed and would exercise the authority to issue partial certificates. Section 19.124-6, as added by T. D. 5016, 1940-2 Cum. Bull. 119. These Regulations, too, were cited for the same proposition in the *Allen-Bradley* opinion (*ibid.*).

The taxpayer does not point to a single provision of the War and Navy Department Regulations, which govern this case, to document its assertion that the partial certification here was "in the teeth" of these Regulations. The provisions relied on by this Court conclusively show the contrary, namely, that the administrators did not voluntarily restrict themselves

from exercising the full measure of authority granted by Section 124 (f). Whether that authority had or had not been exercised prior to October 5, 1943, in situations where post-war utility appeared probable is not important here, since it depended on the factual circumstances then existing; the only question is whether the legal authority to do so existed. It would be extraordinary to find evidence that such authority, vested by statute, had been voluntarily relinquished or waived by the responsible administrators; and such evidence would doubtless have to be clear and specific to warrant so exceptional a conclusion. But taxpayer can find none.

(b) There is similarly no basis for the taxpayer's assumption that Executive Order 9406 was intended to preclude the certifying officials, in passing on future applications filed with respect to facilities which were then under construction, from issuing partial certificates when they deemed that the circumstances, including the probability of post-war utility to the taxpayer, warranted such action. The Executive Order contains no prohibition, explicit or implied, to that effect; and here too it may reasonably be presumed that if there had been an intent to curtail existing authority, it would have been clearly stated. The fact that sub-paragraph (a) and (b) of paragraph 3 of the Executive Order drew a distinction between facilities whose construction was begun before October 5, 1943 and facilities constructed after that date, does not warrant the taxpayer's assumption that the certifying officials would thereafter be precluded from

issuing partial certificates in the former situation and would only be permitted to do so in the latter. Obviously, the distinction was drawn in the Order because thereafter no certificates would be issued for proposed facilities except *in advance* of construction, a requirement which, out of fairness, was not to be imposed where, in reliance on prior regulations, construction had been begun prior to application for a certificate.

The only assurance which the Executive Order gave to the taxpayer was that, since it commenced construction of the project prior to October 5, 1943, a timely, subsequent application would be considered on its merits. Neither before nor after the Executive Order did the taxpayer have any assurance that the project already under construction would qualify for certification or that its full cost would be certified as necessary in the interest of national defense. The Order left the administrators wholly free to make such determination as the particular circumstances required: they could issue a certificate for the full cost, or none at all, or, as in this case, for only that part of the cost which they deemed necessary in the interest of the national defense.¹

In sum, the present case is indistinguishable in its pertinent facts from *Allen-Bradley* and *National Lead*.²

¹ Although the parties made no point of this, it should be noted that in *Allen-Bradley* one of the "partial" certificates was subject to the same paragraph of Executive Order 9406 which governs this case. (See R. 5-6 in No. 78, this Term.)

² Even if the distinctions asserted by the taxpayer are germane, it would not follow, as the taxpayer tacitly assumes, that it would

2. The taxpayer reiterates its contention that the petition for certiorari was filed too late. Since this contention has already been answered (Reply Brief on Motion of the United States for Leave to File a Petition for Rehearing and Petition for Rehearing, pp. 4-6), no further discussion is required here. We shall limit our observations to the taxpayer's attempt (Br. 16) to relate this case to the pending petition for a writ of certiorari (No. 761) in *United States v. F. & M. Schaefer Brewing Co.*, 236 F.2d 889 (C. A. 2).

The opinion of the Court of Claims in this case, promulgated on March 1, 1955 (entry of which the taxpayer contends started the time for a petition for a writ of certiorari under 28 U. S. C. 2101 (c)) expressly stated that "*Entry of judgment is suspended to await the filing by the parties of a stipulation showing the amount due.*" [Italics added.]

The Second Circuit's decision in the *Schaefer Brewing* case does not begin to support the contention that the opinion of the Court of Claims entered in this case on March 1, 1955, constituted a final judgment. Indeed, the *Schaefer* opinion expressly recognizes that (p. 892), "Of course it lies in the judge's power to postpone finality whether because he has not yet reached the point of judgment or whether *because he wants to take time—with the help of counsel or with-*

be entitled to amortize the full cost of the property, in view of the fact that there never was an administrative determination that the full costs were necessary in the interest of the national defense. The Government's argument in this respect was sustained by the Second Circuit in the *National Lead* case, but in view of the disposition of the cases made by this Court was not reached on review here.

out—to embody the result in his own prepared judgment.” [Italics added.] By specifically suspending the entry of judgment to await the stipulation of the parties agreeing on the amount owing, the Court of Claims in this case did precisely what the *Schaefer* case recognizes to be the right of a district court under the Federal Rules, i. e., it postponed finality to embody the result in its own prepared judgment. That finality was not embodied in a judgment in this case until March 30, 1955, and, consequently, the petition was timely.

3. In view of this Court’s order of June 11, 1956 (351 U. S. 980), which vacated the order of December 5, 1955 (350 U. S. 919) denying the petition for rehearing, and continued the petition for rehearing, and in view of this Court’s further order of November 13, 1956 (352 U. S. 905) denying the taxpayer’s motion to vacate the order of June 11, 1956 and to dismiss the petition for rehearing, we do not believe it necessary to comment on the taxpayer’s renewed contention that these actions of the Court were inappropriate. In its petition for rehearing filed in November 1955, the Government called attention to the *National Lead* case, then pending before the Second Circuit and involving the identical issue here presented, and requested the Court to defer further consideration of this case pending the Second Circuit’s decision in *National Lead*. The petition for rehearing requested that, in the interests of expeditious determination of the issue as well as protection of the revenue, the Court should keep this case open to await the outcome of the *National Lead* case. As we view this Court’s

orders of June 11, 1956 and November 13, 1956, they in effect granted the Government's request in its petition for rehearing—the timeliness of which is undisputed—that the matter be continued. Indeed, the Court's order of June 11, 1956 explicitly stated that “the petition for rehearing is continued.” In view of the unique circumstances of this litigation, therefore, we do not think that a grant of the petition for rehearing would raise the broad questions discussed by taxpayer.

CONCLUSION

The petition for rehearing should be granted, and a writ of certiorari should issue. Since this case is plainly governed by the Court's decisions in the *Allen-Bradley* and *National Lead* cases, the judgment below should be reversed on the authority of those decisions.

Respectfully submitted.

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FEBRUARY 1957.

SEP 27 1955

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

October Term, 1955

No. 312

THE UNITED STATES, *Petitioner*

v.

THE OHIO POWER COMPANY

**BRIEF OF RESPONDENT IN OPPOSITION TO PETI-
TION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

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IN THE
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No. 312

THE UNITED STATES, *Petitioner*

v.

THE OHIO POWER COMPANY

**BRIEF OF RESPONDENT IN OPPOSITION TO PETI-
TION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

The petition for a writ of certiorari filed by the United States in the above-entitled case should be denied.

The issue is no longer a live one because the statute expired in 1945; there is no conflict of decisions, and the decision below is correct, fully effectuating the intention of Congress affirmatively expressed in the legislative history of Section 124 of the Internal Revenue Code of 1939.

In an Appendix attached are set forth lower court opinions in related cases which were omitted from petitioner's Appendix.¹

JURISDICTION

On March 1, 1955, the Court of Claims entered its opinion and granted respondent's Motion for Summary Judgment, at the same time denying a similar motion of petitioner. The money judgment was suspended to await the filing of a stipulation by the parties showing the amount due. On March 25, 1955, the stipulation was filed and the court entered the amount of the money judgment on March 30, 1955. In an application dated June 17, 1955,² petitioner requested an extension of time to August 12, 1955, for filing a petition for a writ of certiorari. The application was

¹ Petitioner fails even to mention that the Tax Court has adopted the view of the Court of Claims in *National Lead Co.*, 23 T.C., No. 123, decided March 14, 1955, involving precisely the same issue. See Appendix, p. 19.

² Respondent respectfully directs the attention of this Court to the fact that on June 17, 1955, more than 90 days had elapsed following the lower court's final determination that respondent was entitled to recover and the granting of respondent's Motion for Summary Judgment. 28 U.S.C. § 2101(c). Rule 38(c) of the Rules of the Court of Claims provides that "... where the Court determines that a party is entitled to recover and the amount of the recovery is reserved for further proceedings, the judgment on the question of the right to recover shall be final. . ." In *United States v. Caltex (Philippines) Inc.*, 344 U.S. 149, this Court granted a timely petition for a writ of certiorari to review the decision of the Court of Claims in 100 F. Supp. 970, where that court had determined that the plaintiffs were entitled to recover but had reserved for further proceedings the amount of recovery. See Stern, *Supreme Court Practice* (2d Ed. 1954), p. 42; *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212.

granted by the Chief Justice on June 18, 1955. Respondent, on August 18, 1955, requested and was granted an extension of time to September 27, 1955, for the filing of its brief in opposition. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Where the War Production Board certified taxpayer's entire emergency facility as necessary in the interest of national defense, did the Board have authority also to limit the amount of cost amortizable under Section 124 of the Internal Revenue Code of 1939 to only a part of the total cost of the certified emergency facility?

STATEMENT

During World War II the demand for electrical energy in the industrial areas of Ohio served by the taxpayer was unprecedented. Taxpayer's then existing facilities were inadequate to supply the needs of customers engaged in war production. Therefore, beginning in 1942 taxpayer undertook to expand. - (R. 2-3.) Pursuant to the provisions of Section 124, taxpayer applied for and received four certificates of necessity from the War Department in 1942, 1943, and 1944. ~~All~~ these certificates certified that the entire construction of electric power facilities proposed in the applications was necessary in the interest of national defense during the emergency period, thereby entitling the taxpayer to amortize the total cost of those facilities over the 60-month period prescribed in the statute. (R. 19-20.)

On November 16, 1943, after two of above-mentioned certificates had been issued and while applications for the other two were still pending, taxpayer filed an

application for a fifth certificate. This application covered the construction of a 100,000 kilowatt steam generating plant and related equipment near Canton, Ohio, known as the "Tidd Project Emergency Facility." (R. 3, 20.)

In the meantime, the certifying function under Section 124 was transferred from the Secretaries of War and Navy to the War Production Board.³ In January and July 1944, the Secretary of War issued the third and fourth certificates mentioned above certifying the electric power facilities listed therein as necessary to national defense and without any limitation upon the amount of amortizable cost.⁴ (R. 20.) But in November 1944, the War Production Board issued to this

³ Executive Order 9406, 8 Fed. Reg. 16955, Dec. 17, 1943.

⁴ For almost four years, from 1940, the Secretaries of War and Navy administered the certifying power entrusted to them by the statute. They consistently exercised only the single power to certify the construction or acquisition of facilities as necessary to national defense and did not attempt to specify that only some percentage of total cost would be entitled to the rapid amortization privilege. Petitioner states in footnote 6 of its Petition (p. 8) that the Senate Special Committee Investigating the National Defense Program "scored the War and Navy Departments for their failure" to use the percentage limitation. Examination of the cited S. Rep. No. 440, Pt. 2, 80th Cong., 2d Sess., p. 11, discloses only the statement that the W.P.B. official responsible for issuing certificates had testified he believed the cost of the war could have been reduced if the War and Navy Departments had used the percentage method adopted by W.P.B.

Any contention arising out of such testimony is of course directed to the wisdom of Congress in granting the right to amortize full cost and has no bearing on whether Congress did or did not grant the certifying agent the power to allow amortization of something less than the full cost of certified facilities. Obviously, the wisdom of legislation is not the concern of this Court.

taxpayer the fifth certificate, which had been applied for a year earlier, relating to the Tidd Project on which construction had commenced late in 1943. This certificate, which is in issue here, certified that the Tidd Project in its entirety was necessary in the interest of national defense, but attempted to limit the taxpayer's amortization right under Section 124 to 35 percent of the total cost of the project. (R. 4, 9, 21.)

This certificate was issued pursuant to an unpublished policy adopted by the Board attempting to limit the amortization deduction on necessary emergency facilities, as petitioner states, to the excess of war-time cost over normal pre-war cost (estimated to be 35 percent) where the facilities would presumably be useful in post-war operations (Petition for Certiorari; p. 3; R. 5-7).

When the five certificates were presented by this taxpayer to the Commissioner of Internal Revenue, he allowed amortization of the entire cost of the electric power facilities certified in the first four, but with respect to the Tidd Project certificate allowed amortization of only 35 percent of the construction cost despite the fact that the entire construction had been certified as necessary in the interest of national defense. At the time taxpayer received this certificate construction of the Tidd Project had been under way more than a year,⁵ having been undertaken about the time it received other certificates from the War Department containing no limitation on the amount

⁵ In order to expedite construction of national defense facilities Congress had written into the amortization law a provision specifically designed to encourage taxpayers to commence construction before receiving their certificates. Section 124(f)(3) of the Internal Revenue Code of 1939.

of construction cost amortizable. (R. 5-7, 8, 9, 20-22.) The percentage-of-cost policy which the Board applied was never promulgated in any regulation, nor was it otherwise published until after 1945.

The fundamental issue is whether Section 124(f)(1) of the Internal Revenue Code of 1939 conferred upon the War Production Board (successor to the Secretaries of War and Navy)

(1) the single power to certify that the construction or acquisition of facilities was "necessary in the interest of national defense," or

(2) the dual power to certify (a) the necessity of the construction or acquisition of the facility, and (b) the percentage of its cost which could be amortized for tax purposes during the "emergency period" of World War II.

There is absolutely no authority in Section 124(f)(1) empowering the Board to limit the amortizable base to some percentage of cost, and the legislative history conclusively establishes that Congress intended the statute to allow the certified facilities to be "completely written off for tax purposes" over a five-year period.*

Section 124 was enacted as a part of the Second Revenue Act of 1940, to be effective during the "emergency period" which was terminable by Presidential proclamation. The period was terminated by proclamation on September 30, 1945. (R. 20-22.)

* Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940), pp. 124, 125, 127; Cong. Rec., Aug. 29, 1940, pp. 11239, 11240, 11246. See also citations in footnotes 7 and 8, *infra*.

The statute was enacted for the express purpose of inducing private industry to invest its capital in projects necessary to national defense.⁷ The inducement offered by the Administration and by Congress was that, in lieu of depreciation during normal useful life, the entire cost of projects certified as necessary in the interest of national defense would be deductible for income and excess profits tax purposes over a maximum period of sixty months, or over the "emergency period," if shorter. Thereby, private industry was assured that, to the extent its earnings in the emergency period equalled the cost of the national defense facilities, those earnings would be relieved from such taxes.⁸

The certifying agents (first the Secretaries of War and Navy, later the War Production Board) were authorized by Section 124(f)(1) to certify that the construction or acquisition of facilities was "necessary in the interest of national defense during the emergency period." When a certificate of necessity was issued the construction or acquisition became an "emergency facility." (Section 124(e).) Section 124(a) provided that taxpayers might elect to deduct the

⁷ H.R. Rept. 2894, 76th Cong., 3d Sess., p. 2; Joint Hearings before Committee on Ways and Means and Committee on Finance, Aug. 9, 10, 12-14, 1940, 76th Cong., 3d Sess., pp. 21-30; Statement of John D. Biggers, Tax Adviser to Council of National Defense at Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940), pp. 166-167; Statement of William S. Knudsen, *idem.*, p. 158.

⁸ Joint Hearings before Committee on Ways and Means and Committee on Finance, August 9, 10, 12-14, 1940, 76th Cong., 3d Sess., pp. 74-75; Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 123.

"adjusted basis" (i.e. cost) of any emergency facility over a period of sixty months, or over the emergency period if shorter.

Since the Commissioner failed to follow the mandate of Section 124(a) and allowed amortization of only 35 percent of the cost of constructing the Tidd Project, the taxpayer brought suit in the court below for refund of income and excess profits taxes paid in 1943, 1944 and 1945 with respect to the remaining 65 percent.

REASONS FOR DENYING THE WRIT

1. THE ISSUE IS NO LONGER A LIVE ONE

The certifying provisions of Section 124, under which this case arises, expired with the end of the emergency in 1945. In 1950 Congress enacted a new rapid amortization provision in connection with the Korean War excess profits tax law (Section 216 of Revenue Act of 1950; Section 124A Internal Revenue Code of 1939). In the new statute, Congress added a new clause, for the first time granting the certifying agent the power to certify a percentage of cost as well as the necessity of facilities.

A comparison of the two laws follows:

Section 124(f)(1)— 1940-1945 Law

"[Sec. 124(f)]

"(f) DETERMINATION OF ADJUSTED BASIS OF EMERGENCY FACILITY.—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

"(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period. . ."

Section 124A(e)(1)— 1950 Law

"[Sec. 124A(e)]

"(e) DETERMINATION OF ADJUSTED BASIS OF EMERGENCY FACILITY.—In determining, for the purposes of subsection (a) or subsection (g), the adjusted basis of an emergency facility—

"(1) There shall be included only so much of the amount of the adjusted basis of such facility (computed without regard to this section) as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1949, as the certifying authority, designated by the President by executive order, has certified as necessary in the interest of national defense during the emergency period, *and only such portion of such amount as such authority has certified as attributable to defense purposes. . .*" (Italics supplied).

Thus, in the new law the Congress for the first time conferred upon the certifying agency the power to certify both (1) the necessity of the facilities, and (2) the amount of amortizable cost.

In the absence of the italicized clause in the second column, it is plain that the certifying agency had authority to certify only that the construction of facilities was necessary to national defense and had no power to specify that less than entire cost of construction of the certified facilities could be amortized.

Inasmuch as the old law has long since expired and the current law eliminates the question, the issue which petitioner seeks to have this Court review is dead. There is no reason for this Court to issue a writ in a case of this character where its decision will not aid the administration of current statutes. *Sokol Bros. Co. v. Commissioner*, 340 U.S. 932; *Community Services, Inc. v. United States*, 342 U.S. 932; *United States v. Abrams*, 344 U.S. 855; Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 466-468.

2. THERE IS NO CONFLICT OF DECISIONS

Three cases have been decided by the lower courts on the precise issue of the amount of the amortization deduction to which a taxpayer is entitled where the certificates of necessity have purported to limit the amortization right to a percentage of cost. All are in agreement that full cost is amortizable. Two of these decisions have been rendered by the Court of Claims—the case of *Wickes Corp. v. United States*, 108 F. Supp. 616, and the case at bar. The third decision is that of the Tax Court in the *National Lead* case, *supra*, to which petitioner does not refer. That opinion was reviewed by the 16 judges of the Tax Court and approved with only one dissent. The opinion adopts the view of the Court of Claims in the *Wickes* case and allows the taxpayer to amortize the full cost of the certified facilities over the accelerated period. (Appendix, p. 19.)

A different issue was involved in the case of *United States Graphite Co. v. Sawyer*, 176 F. 2d 868 (CA-D.C.), cert. den. 339 U.S. 904, affirming, *per curiam* without opinion but with one dissent, *United States Graphite Co. v. Harriman*, 71 F. Supp. 944 (D. Ct.,

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D.C.), relied upon by petitioner to establish a conflict. (Appendix, p. 8.) There the taxpayer sought a writ of mandamus directing the War Production Board to eliminate the 35 percent of cost limitation from the same Certificate of Necessity ultimately at issue in the *Wickes* case. The writ was denied. The District Court interpreted Section 124(f)(1) as granting authority to the War Production Board to certify both the necessity of the facilities and the percentage of cost entitled to amortization. On appeal, two judges adopted *per curiam* the District Court's opinion, but Judge Wilbur K. Miller, in a well-considered dissenting opinion, demonstrated that the majority had misconstrued the statute and had failed to give effect to the intention of Congress. (Appendix, pp. 8-18.) Both the Court of Claims and the Tax Court, in the later decisions, took care to state that they had reached the same conclusion as Judge Miller and agreed with his interpretation of Section 124(f)(1).

Even though the statutory interpretations conflict, it does not follow that the *Graphite* decision presents any direct conflict with the other three cases. It is hornbook law that the extraordinary writ of mandamus will not be issued to a governmental agency where the litigant has an adequate remedy at law. The later decision of the Court of Claims in the tax refund petition of the Wickes Corporation, successor to the U. S. Graphite Company, demonstrates that there was no legal basis for the issuance of a writ of mandamus.

Thus, it does not follow (as contended at p. 6 of the Petition) that the decisions are "irreconcilable" and that if the court in the *Graphite* case had interpreted the statute in the same way as the Court of Claims and the Tax Court, a writ of mandamus would have issued:

Quite the contrary, the court might well have held that the Graphite Company had not shown any injury from the Board's action and, if ultimately so injured, had an adequate legal remedy.

Petitioner can hardly be serious in its contention that the *Ohio* and *Wickes* decisions conflict with the *Graphite* case. If there is such a conflict, the Government most certainly would have applied for a writ of certiorari in the *Wickes* case two years ago, since the Solicitor General is virtually bound to bring conflicts in decisions of co-ordinate courts to the attention of this Court. Moreover, the Government would have asserted the defense of *res judicata* in the *Wickes* case, which it did not do.

3. THE AMOUNT INVOLVED IN THE ISSUE AT BAR IS MUCH LESS THAN STATED IN THE PETITION

The full cost of this taxpayer's facilities is deductible for income and excess profits tax purposes either through amortization in the World War II emergency period, or in later years through depreciation, obsolescence or other form of exhaustion. The revenue is affected only to the extent of differences in the tax rates. The maximum corporate tax rate in 1944 and 1945 was 80 percent of corporation surtax net income; the current corporate rate is 52 percent and in the intervening years the combined income and excess profits maximum tax rate has ranged from 38-70 percent.

On the basis of present corporate rates, the net tax reduction of the respondent here will be not more than approximately \$2,000,000, instead of the amount of \$5,885,388.22 stated in the Petition.

Correspondingly, the amounts involved in any similar claims will be vastly reduced. To the extent that

the claimants are individual taxpayers, such as partners or joint venturers, the difference in tax rates between the World War II years and current years is probably even less than for corporations. And, as to corporations which were not subject to the maximum tax rate of 80 percent in the latter years of World War II, the net tax reduction will also be smaller.

Eight cases in the courts and 31 at the administrative level do not create an issue of general importance where the operative provisions of the statute expired ten years ago.⁹

Nor has petitioner shown that the cases it states are pending depend solely for disposition on the issue involved in the instant case.

All the cases alleged to be now pending must have been open when the Solicitor General decided more than two years ago not to apply to this Court for a writ of certiorari in the *Wickes* case. That case, too, involved a not insignificant gross tax refund for 1944 and 1945. It is submitted he must have decided, then, that the *Wickes* decision was correct.

4. THE DECISION BELOW IS CORRECT

Twenty-five judges of lower courts, including the Tax Court, have considered the statutory interpretation of Section 124(f)(1) and the extensive legislative history showing the intent of Congress in enacting it.

⁹ In *Beal v. United States*, 182 F. 2d 565 (CA-6), certiorari was denied (340 U.S. 852) where the statute in controversy had expired in 1945, despite a conflict and despite the fact that the petition for certiorari pointed out that from 12,000 to 15,000 persons might claim from 16 to 22 million dollars in similar cases and that a number of cases were then pending.

Twenty agree that the decision below is correct; five disagree. Three of those disagreements were registered in the mandamus proceeding in the *Graphite* case decided by the District Court in 1947. With all due respect to the District Court, its opinion is superficial and glosses over both the statutory language and the intent of Congress. Most significantly, the dissenting opinion of Judge Miller in that case (Appendix, p. 8), has won the approval of four judges of the Court of Claims and 15 judges of the Tax Court. No comprehensive opinion has been written in support of the minority view since the opinion of the District Judge in 1947 (Appendix, p. 1), and no judge has undertaken to answer the compelling dissent of Judge Miller.

A comparison of the District Court's opinion with the dissenting opinion in the *Graphite* case and the majority opinion of Judge Madden in the *Wickes* case will demonstrate that the decision below correctly interprets the statute and effectuates the Congressional intent.

The pertinent part of Section 124(f)(1) provided:

"(f) Determination of Adjusted Basis of Emergency Facility.—In determining, for the purposes of subsection (a) * * *, the adjusted basis of an emergency facility—

"(1) *There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction * * * or acquisition after December 31, 1939, as either the Secretary of War or * * * the Navy has certified as necessary in the interest of national defense * * *.*" (Italics supplied.)

At the outset it is important to observe that the section is a direction to the Internal Revenue Commissioner as to the cost of the facility which he shall include in determining the taxpayer's amortization deduction under Section 124(a). It is not a Congressional directive to the Secretaries that they shall include in the Certificate only so much of the cost as they deem necessary in the interest of national defense.

In essence, as applied to this case, subsection (f) (1) provides for inclusion in amortizable basis the full cost attributable to the construction of facilities *after December 31, 1939*, if such construction has been certified as necessary in the interest of national defense.

The first question framed by the statute is whether the construction has been certified as necessary in the interest of national defense. That fact is of course established here.

The sole remaining question framed by subsection (f) (1) is what part of the cost ("adjusted basis") "is properly attributable" to construction or "acquisition after December 31, 1939." The statute includes for amortization purposes only the cost of construction or acquisition after December 31, 1939. Congress plainly desired to draw a line dividing the cost of those emergency facilities which were under construction on December 31, 1939, in order to prevent the amortization of the pre-1940 part of the cost of construction.¹⁰ An examination of subsection (e) defining an "emergency facility" will show that the term means any certified facility the construction or acquisition of which was *completed* after December 31, 1939. Thus,

¹⁰ H.R. Rept. No. 2894, 76th Cong., 3d Sess. (1940) p. 38, quoted *infra* at pages 17-18.

Congress contemplated that necessity certificates would be issued by the certifying agency with respect to construction or acquisition commenced on or before December 31, 1939. But by the terms of subsection (f) (1) Congress directed the inclusion in the adjusted basis (i.e., cost) entitled to amortization only the cost attributable to the part of the construction or acquisition occurring after December 31, 1939 and did not in any way restrict that amortization right to some portion of such cost.

The District Court in the *Graphite* case, however, seized upon the phrase "only so much of the amount otherwise constituting such adjusted basis" as authorizing the War Production Board to certify a percentage of cost for tax amortization as well as the construction or acquisition of facilities.

In order to reach the conclusion that the certifying agency was granted control over the amount of amortizable cost it would be necessary to interpret the statute as if it read somewhat as follows:

In determining the adjusted basis of an emergency facility, there shall be included only so much of the cost [adjusted basis] otherwise amortizable as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period.

Such interpretation ignores the all-important phrase following immediately after the statutory words "only so much of the * * * adjusted basis." The ignored phrase is:

"as is properly attributable to such construction . . . or acquisition after December 31, 1939,

At best, the word "such" immediately preceding "construction . . . or acquisition" must be deleted to reach the interpretation for which the Government contends. This is exactly what the District Judge did in the *Graphite* case. (Appendix, p. 1, at 5-6.) Judge Miller, in his illuminating dissent, refers to this omission in demonstrating the District Court's misconstruction of the statute. (Appendix, pp. 15-16.) When the word "such" is given its proper meaning it becomes plain that the power of the Secretaries was limited to certification of *such* "construction . . . or acquisition," and did not extend to certification of amortizable cost.

If there were any doubt about the correct interpretation of the words of Section 124(f)(1) it is quickly dispelled by a review of the legislative history. It is conclusive of the fact that the Congress intended the full post-1939 cost of certified facilities to be included in the base for tax amortization.

The report of the Ways and Means Committee stated:¹¹

"Section 124 provides that a corporation shall be allowed a deduction for income and excess-profits tax purposes for the amortization of certain facilities which . . . either the Secretary of War or the Secretary of the Navy certify as necessary in the interest of national defense during the present emergency. Such facilities are land, buildings, machinery and equipment or parts thereof acquired after July 10, 1940 [changed to December 31, 1939], or the construction, reconstruction, erection, or installation of which was completed after July 10, 1940 [changed to December 31, 1939]. . . . Although a facility may be an emergency facility even though its construction was

¹¹ H.R. Rept. No. 2894, 76th Cong., 3d Sess. (1940) p. 38.

begun on or before July 10, 1940 [changed to December 31, 1939], only so much of its adjusted basis as is attributable to certified construction taking place after July 10, 1940 [changed to December 31, 1939], is subject to amortization. The remainder of the adjusted basis is subject to depreciation. . . .”

Assistant Secretary of the Treasury Sullivan testified before the Senate Finance Committee as follows:

“Senator George: Just a minute, Mr. Sullivan. You say it is necessary for them to certify that it is necessary to national defense. Do they stop there?”

“Mr. Sullivan: I beg your pardon.”

“Senator George: Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amounts to?”

“Mr. Sullivan: No; they do not.”

“Senator George: They turn that back to the Treasury?”

“Mr. Sullivan: No sir; under the bill automatically the amortization to which they are entitled is 20 percent, a year, for 5 years.”

When the statute was before the House of Representatives for enactment, Representative Böehne of Indiana, a member of the Ways and Means Commit-

¹² Hearings before Senate Finance Committee on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940) p. 158.

tee and its subcommittee on Internal Revenue Taxation, made the following statement on the floor:¹³

"Now just what do these amortization provisions do? First, they fix the useful life of facilities certified to be necessary in the national defense as 5 years. They remove all problems of proof.

"Second, there is no bounty, bonus, or windfall involved. Introducing certainty into the present provision is a desirable improvement. It is designed to give the manufacturer, who is asked to furnish needed new facilities, only a fair break.

"Finally, the effect of the clearing-up process is to give a straight-line basis—20 percent a year

* * *

* * * * *

"In the present national emergency, business is asking no favor of the Government when it merely desires the certainty that private capital expended to construct, or used to acquire, a needed new facility, certified to be necessary for the national defense, may under this law be amortized over a 5-year useful life, which is what business is being told is the present program. If the emergency lasts longer * * * no further deductions * * * will be allowed. The proposed amortization provisions will do no more than is fair and just. It will certainly aid national defense."

The legislative history destroys completely petitioner's contention that the 35 percent limitation is justified by the presumption that the facility would have post-war use. It leaves no doubt that Congress intended

¹³ Congressional Record, Aug. 29, 1940, p. 11240. See also the statement of Representative Jere Cooper, Chairman of the Subcommittee on Internal Revenue Taxation at the time Section 124 was enacted, *Id.*, p. 11246.

to disregard the possible post-war value and utility of the certified facilities in allowing the amortization deduction: William S. Knudsen, a member of the Advisory Commission to the Council of National Defense, testified before the Senate Finance Committee that the Commission unanimously recommended against any provision restricting the post-war use of amortized facilities, and stated:¹⁴

“If, at the end of the emergency, it turns out that plant facilities are useful for productive purposes during the emergency period only, the taxpayer is being only fairly dealt with by allowing him to charge off his plant against taxable income during the emergency period. If, however, the plant has productive use after the emergency period is terminated, there is no over-all advantage to the taxpayer in the rapid amortization because during the period after the emergency it will no longer be able to deduct depreciation or amortization on the plant, it having already been completely written off for tax purposes.”

In the same Hearings, Senator Vandenberg questioned Secretary Sullivan on this point. In reply, Mr. Sullivan stated:¹⁵

“We don't know that that [i.e., a five-year period or less] is the expected useful life. There are certain facilities that are being constructed for purely national-defense projects, which may be just as useful after the war is over, or the present emergency is over, or the particular contract they are built to perform is over, as they

¹⁴ Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 159.

¹⁵ Hearings before Senate Finance Committee on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 12.

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are during the time that contract is being performed."

Secretary Sullivan added:¹⁶

".... I couldn't say to this committee that it is reasonable to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946. I don't think that is 'reasonable,' and yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture."

Thereafter, Congress enacted practically unchanged, as Section 124 of the Internal Revenue Code, the provisions discussed before the Senate Finance Committee.

The attempt of the petitioner at pages 11-12 of its Petition to push aside the enlightening legislative history must completely fail. The legislative history does "aid in answering the question here at issue" because it specifically shows Congress withheld from the Board the power to certify a percentage of cost which is the question at issue. In view of the many representations which Congress and the Administration had made to encourage the Ohio Power Company and other taxpayers to invest their private capital in defense facilities, and having been granted four certificates under section 124 permitting the amortization of the full cost of similar defense facilities over the emergency period, the 35 percent limitation placed on the fifth certificate creates, as Judge Miller said, a

¹⁶ Id., p. 125.

result in this case "so incongruous as to be almost grotesque." (Appendix, p. 18.)

The petitioner is equally in error at page 11 when it suggests that the question before the Board was not, "Is the facility necessary," but "How necessary." As heretofore demonstrated, Congress intended to leave only the first question to the certifying agent.

Nor do the Treasury Regulations recognize and provide for Necessity Certificates with percentage of cost limitations as claimed by petitioner (Petition for Certiorari, p. 10).

Sec. 29.124-6¹⁷ deals with three situations:

(1) Where the entire construction was certified and all of it took place after December 31, 1939. (2d ¶)

(2) Where the entire construction was certified but only a portion of such construction took place after December 31, 1939. (3d ¶)

(3) Where only a portion of the construction taking place after December 31, 1939, was certified as necessary. (4th ¶)

In each instance the regulation provides for amortization under Section 124 of the whole post-1939 cost of the *construction certified*. Petitioner therefore is not correct in its statement at page 10 of the Petition that the regulation "specifically envisions partial certifications of the type here issued." The "50 percent

¹⁷ Reg. 111, Sec. 29.124-6, reproduced at pp. 16-18 of Appendix A to Petition.

Of course, the very fact that the Treasury Regulations deal with the amount of amortizable cost allowable under Certificates demonstrates that the War Production Board had no power to certify amortizable cost but only to certify physical facilities.

certificate" referred to is one where only 50 percent of the *construction* was certified as necessary to national defense. It does not, as petitioner would like this Court to believe, deal with the case at bar, where the entire construction was certified as necessary but its amortizable cost purportedly was limited to 35 percent because the facility was presumed to have post-war utility.

Petitioner also argues that, even if the lower court's interpretation of the statute was correct, it was improper for the court below to allow amortization deductions based on full cost of the taxpayer's certified facility (Petition, pp. 12-13). The contention stems from a misapprehension of the nature of this proceeding. This is not a suit for judicial review of some discretionary action of an administrative body such as is the case of *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, cited by petitioner. The suit is for a refund of taxes due upon the basis of giving effect to a certification of the fact that this taxpayer's "Tidd Project Emergency Facility" was necessary in the interest of national defense during the emergency period. The court below merely held that the Certificate met the requirements of Section 124 and applied the mandate of subsection (a) that the "adjusted basis" (i.e. cost) of the certified facility was entitled to be amortized over a sixty months period, or during the emergency period if shorter.

CONCLUSION

There are no valid reasons for granting the petition for a writ of certiorari. The decision below correctly construes Code Section 124 to give effect to the clear intent of Congress. There is no conflict of decisions. The Tax Court of the United States, which is the only other court to decide the precise issue, has joined the Court of Claims in holding against the Government. The problem is not of the scope which merits a review by this Court because the statute involved expired ten years ago and only a few claims remain to be disposed of under that statute. The petition should be denied.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

UNITED STATES GRAPHITE COMPANY,

v.

HARRIMAN, SECRETARY OF COMMERCE.

No. 36695

Filed June 17, 1947

Opinion

J. Marvin Haynes, of Washington, D. C., for plaintiff.

John F. Sonnett, Asst. Atty. Gen., and *Edward H. Hickey*, Sp. Asst. to Atty. Gen., for defendant.

PINE, Justice:

Plaintiff is a manufacturer of a graphite product known as "graphitar." It is used particularly in the manufacture of marine and aircraft engines. In 1943 the demand for graphitar began to exceed the capacity of plaintiff's plant. Accordingly, plans were made for a factory addition and for the necessary machinery and equipment therein required. On June 27, 1943, plaintiff filed an application for a certificate of necessity under Section 124 of the Internal Revenue Code, in order that it might secure a deduction for amortization of the entire cost of the factory addition upon its Federal income and excess profit tax returns, and

on October 28, 1943, a necessity certificate was issued therefor.

On May 29, 1944, plaintiff filed an application for a necessity certificate covering facilities (machinery, etc.) for use in the factory, which had then been constructed. Thereafter plaintiff received a communication dated July 17, 1944, and entitled "letter of predetermination," stating that these facilities were eligible for tax amortization on a 35% basis, provided the date of acquisition was subsequent to the date of such letter. On July 27, 1944, plaintiff filed an affidavit showing that a portion of such facilities had been acquired prior to the date of the letter of predetermination and that the balance had been acquired thereafter; whereupon there was issued to the plaintiff a necessity certificate for that part of the facilities listed as being received after the date of the letter of predetermination, up to 35% of their cost. Thereafter plaintiff demanded the issuance of a certificate which would include the entire cost of all the facilities, irrespective of the date of acquisition. This being refused, plaintiff brought this action to compel its issuance.

Defendant first moved to dismiss the complaint, and subsequently moved for a summary judgment. The action is before me for decision on these motions.

The issuance of this certificate of necessity is authorized by Section 124 of the Internal Revenue Code, 26 U. S. C. 124. Designed to stimulate the investment of private capital in defense facilities, this statute authorized the amortization of their cost as a tax deduction over a period of five years or less.

Plaintiff contends that defendant's predecessor, the War Production Board,¹ had no legal right to issue a necessity certificate for only 35% of the cost of the facilities acquired after the date of the letter of predetermination, but, once having determined to issue a necessity certificate, was required to issue one for the entire cost of the facilities acquired, both before and after such date.

The applicable provisions of this statute are contained in Section 124(f) of the Internal Revenue Code, reading, so far as material, as follows:

"(f) . . . In determining . . . the adjusted basis of an emergency facility—

"(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such . . . acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

"(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the

¹ Defendant's immediate predecessor was the Temporary Controls Administrator, whose predecessors were, in the order named, Civilian Production Administrator and the War Production Board, the Chairman of which was vested with the functions of the Secretary of War and the Secretary of the Navy under Section 124 of the Internal Revenue Code.

Executive Order No. 9841, April 23, 1947.

Executive Order No. 9809, December 12, 1946.

Executive Order No. 9638, October 4, 1945.

Executive Order No. 9406, December 17, 1943.

beginning of such construction, reconstruction, erection, or installation, or the date of such acquisition . . .”

The applicable provisions of the Regulations² prescribed under the above-quoted statute are as follows:

“(3)(c)(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed.

“(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.”

It will be noted that Section 4 of the Regulations, above quoted, provides that the acquisition of a facility will not be deemed necessary unless a determination of necessity is made prior to the date of acquisition. Defendant's action in limiting the certificate of necessity to the facilities acquired after the letter of predetermination appears to be authorized by this regulation, and plaintiff does not contend to the contrary. Instead, it places its reliance upon the claim that the regulation contravenes the statute. The question, therefore, is whether the six-month period may be shortened by regulation, the effect of which was to apply a brake on over-expansion of plant facilities, by requiring their necessity to be determined prior to

² Regulations governing the issuance of necessity certificates under Section 124(f) of the Internal Revenue Code prescribed by the Chairman of the War Production Board with the approval of the President, dated December 17, 1943. 8 F.R. 16964.

acquisition in order to be eligible for tax amortization. As above set forth, the statute provides that the necessity certificate shall have no effect unless application therefor is filed before the expiration of six months after date of acquisition. But the statute also contemplates its implementation by regulation, and expressly provides that certification of necessity shall be under regulations prescribed from time to time by the executive officials. Under defendant's interpretation, the statute permits these officials, in the exercise of discretion, to shorten, by regulation, the time for filing applications for necessity certificates, but places an outside limit of six months on their effectiveness, beyond which executive discretion ceases. This construction would seem to be warranted, in view of the clear purpose of Congress to provide flexibility in administration to meet changing conditions and circumstances in the prosecution of the defense program; but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding.³

In respect of the second contention of plaintiff, that the statute does not authorize defendant to limit the amortization deduction to 35% of the cost, it should

³ Adams v. Nagle, 303 U.S. 532, 542.

Wilbur v. United States ex rel Kadrie, 281 U.S. 206, 219.

Work v. United States ex rel Rives, 267 U.S. 175, 182, 183.

United States ex rel Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 323.

Thomas v. Vinson, 80 U.S. App. D.C. 346, 349.

Red Canyon Sheep Co. v. Iekes, 69 App. D.C. 27, 41.

United States ex rel Corbin v. Doyle, 68 App. D.C. 100, 104.

United States ex rel White v. Coe, 68 App. D.C. 218, 220.

Iekes v. Pattison, 65 App. D.C. 116, 119.

Reichelderfer v. Johnson, 63 App. D.C. 334.

Stookey v. Wilbur, 61 App. D.C. 117, 118.

be pointed out that the statute requires that there shall be included ONLY SO MUCH of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later Chairman, War Production Board] has certified as necessary in the interest of national defense, which certification shall be under such regulations as may be prescribed from time to time by the executive officials with the approval of the President. Among the regulations prescribed is Section (3) (c) (vi), *supra*, which provides that necessity certificates will be issued only where it is to the advantage of the government that the facilities be privately financed. Certification under this statute, as implemented by this regulation, clearly involved an exercise of discretion, which will not be set aside unless unreasonable, arbitrary, or capricious.⁴ Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost (estimated at 35%) in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment

⁴ *Wilbur v. United States ex rel Kadrie*, *supra*.

Work v. United States ex rel Rives, *supra*.

United States ex rel Riverside Oil Co. v. Hitchcock, *supra*.

Calf Leather Tanners Assn. v. Morgenthau, 65 App. D.C. 93, 98, 99.

United States ex rel Bowling v. Hines, 60 App. D.C. 180, 181.

McCarl v. Rogers, 60 App. D.C. 111.

McCarl v. Walters, 59 App. D.C. 237, 238.

in the defense effort which would not be available because of fear that such investment would have no post-war value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue. Thus there is no showing that the exercise of this discretion comes within the exception permitting courts to intervene. So far as its exercise involves interpretation of the statute in question, the statement made in the preceding paragraph is equally applicable to the point here under discussion.

Accordingly the motion for summary judgment will be granted. Counsel will present, on notice, judgment carrying this opinion into effect.

8

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 9680

THE UNITED STATES GRAPHITE COMPANY, APPELLANT

v.

CHARLES SAWYER, SECRETARY OF COMMERCE, APPELLEE

Appeal from the District Court of the United States
for the District of Columbia (now United States
District Court for the District of Columbia)

Argued October 7, 1948

Decided February 28, 1949

Mr. J. Marvin Haynes, with whom *Messrs. W. C. Magathan* and *F. Eberhart Haynes* were on the brief, for appellant.

Mr. Edward H. Hickey, Special Assistant to the Attorney General, with whom *Messrs. George Morris Fay*, United States Attorney and *Richard E. Guggenheim*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Herbert A. Bergson*, Acting Assistant Attorney General, also entered an appearance for appellee.

U Before EDGERTON, CLARK, and WILBUR K. MILLER, JJ.

PER CURIAM: The judgment is affirmed on the opinion of Judge Pine in the District Court. *United States Graphite Co. v. Harriman*, 71 Fed. Supp. 944.

WILBUR K. MILLER, J., dissenting: As my brethren have approved and adopted the District

Court's opinion without reproducing it, I shall restate the case before giving the reasons for my dissent.

In an effort to induce private enterprise to use its own funds in expanding manufacturing facilities to meet the requirements of national defense, the Congress enacted in 1940 § 124 of the Internal Revenue Code. Subsection (a) thereof is in part as follows:

"Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. . . ."

This is unequivocal and imperative language and is a grant of a right to the deduction described. If a later provision of § 124 is to be held to have modified a taxpayer's absolute right to the five-year amortization described in subsection (a) by giving to an administrative agency authority to restrict the amortization to something less than the entire cost, I take it that the intention of Congress to do so should be expressed in clear and unmistakable terms.

An emergency facility was defined by subsection (e) as one (a) which had been constructed or acquired after December 31, 1939, and (b) which had been certified by the proper authority as necessary in the interest of national defense.¹

¹ The pertinent portion of subsection (e) is as follows:

"(1) *Emergency facility.* As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, re-construction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. For

The appellant is a manufacturer of a graphite product known as "graphitar." In 1943 when the government required for war purposes greater quantities of graphitar than appellant could produce, the War Department insisted that it double its capacity by erecting a new building and installing therein the necessary machinery and equipment.

Relying—naively, as it turned out—on the provisions of § 124 of the Internal Revenue Code, the appellant erected the building and began the acquisition of machinery and equipment. With respect to the building, the appellant applied on June 27, 1943, for a necessity certificate under subsection (f)(1) of § 124, and received it from the Secretary of War on October 28, 1943. The entire cost of the building could therefore be amortized for tax purposes in the statutory five-year period. But with the acquisition of machinery, the appellant's troubles began. On May 29, 1944, and within six months after the installation of certain

the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by any person after December 31, 1939, and not earlier than six months prior to the filing of an application for a certificate under subsection (f), and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility, notwithstanding that the other part of such facility was constructed, reconstructed, erected, or installed earlier than six months prior to ~~the~~ filing of such application. For the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by a corporation after December 31, 1939, and before June 11, 1940, and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility and to have been completed on June 10, 1940, notwithstanding that the entire facility was not completed until after June 10, 1940."

machinery and equipment, appellant applied for a covering necessity certificate to the War Production Board, which by Executive Order had succeeded the Secretaries of War and the Navy as the certifying agency. Although both building and machinery were essential to the increased production which the War Department wanted, the War Production Board refused to certify the full cost of the machinery. The Board issued to appellant on July 17, 1944, what it called a "letter of predetermination", stating the machinery and equipment would be eligible for amortization, but attaching two conditions which the appellant asserts were unauthorized.

Those conditions were: (1) that the machinery and equipment acquired by the appellant prior to July 17, 1944, the date of "predetermination", could not be amortized, and (2) ~~that~~ only 35 per cent of the cost of machinery and equipment acquired after that date could be amortized.

The first condition was imposed by the Board pursuant to its own regulation that a necessity certificate would not be issued unless application therefor had been made before the construction or acquisition of the facility.

The second condition was imposed by the Board because it had concluded that only 35 per cent of the cost of appellant's machinery installed after the date of "predetermination" could be certified as necessary to national defense, its idea being that "the facilities sought to be certified were of such a nature as to be presumably useful in post-war operations." Apparently the Board's theory was that 35 per cent of the cost of the machinery represented war-caused excess over the pre-war cost.

With respect to the first condition imposed by the Board pursuant to its regulation that application for certification must be made before the facility had been constructed or acquired,² the question is as to the validity of the regulation. To be sure, the Board had express authority under subsection (f)(1) to prescribe regulations governing certification. But a regulation may not conflict with the statute under which it is promulgated.

This regulation is in direct conflict with subsection (f)(3) of the statute, the pertinent portion of which follows:

“(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before December 1, 1941, whichever is later,”

Because of the conflict with the statute, the regulation was invalid and did not confer upon the War Production Board power to exclude from the necessity certificate all the cost of the machinery and equipment which the appellant acquired prior to July 17, 1944. Application for certification of that cost was season-

² The regulation, dated December 17, 1943, 8 Fed. Reg. 16964, was approved by the President and the pertinent portion is as follows:

“(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.”

ably made under the terms of the statute and could not be refused on the ground that the application had not been made before acquisition as required by the invalid regulation.

The second condition imposed by the Board in its "letter of predetermination" which restricted the taxpayer to a deduction with respect to the amortization of only 35 per cent of the cost of its machinery and equipment acquired after July 17, 1944, was authorized, the appellee contends, by § 124 (f)(1), which is as follows:

"... In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

"(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

In order to reach the extraordinary conclusion that subsection (f) (1) authorizes the certification as necessary to national defense of less than 100 per cent of the cost of a facility otherwise "emergency" in character, the appellee is forced to read subsection (f)(1) as though it provided:

There shall be included in amortizable cost only so much of the cost of the facility as ... the Secretary ... has certified as necessary in the interest of national defense

Such reading omits important words in the subsection. It overlooks completely the fact that its language includes the following:

“... as is properly attributable to such construction ... after December 31, 1939, as ... the Secretary ... has certified as necessary in the interest of national defense. ...”

The appellee's construction of subsection (f)(1) as meaning “only so much of the cost as has been certified as necessary in the interest of national defense” does plain violence to the grammatical structure of the statutory sentence, for, as has been said, it leaves out important words. Careful reading of the poorly worded subsection reveals its meaning as

There shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense.

We have seen that subsection (e), in defining the term “emergency facility”, expressly excluded anything constructed or acquired before December 31, 1939. That critical date of subsection (e) was carried on into subsection (f)(1), which undertook to govern a situation involving a facility, a part of which was constructed before December 31, 1939, and so could not be amortized, and the other part of which was constructed after that date and so could be certified for amortization. I admit the Congress did a poor job of statute writing in framing subsection (f)(1); but when all the subsections are read together the meaning can be spelled out. The mere fact that subsection (f)(1) is so written does not justify a construction of it which eliminates important words and thereby dis-

torts it. I think subsection (f) (1) clearly means there can be amortized only the "adjusted basis" (which in this case means cost) of that physical portion of a facility which is "emergency" in character in that (a) it had been constructed after December 31, 1939, and (b) it had been properly certified as necessary in the interest of national defense.

The District Court's opinion, which has been adopted by my brethren as the opinion of this court, includes the following:

"In respect of the second contention of plaintiff, that the statute does not authorize defendant to limit the amortization deduction to 35% of the cost, it should be pointed out that the statute requires that there shall be included **ONLY SO MUCH** of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later Chairman, War Production Board] has certified as necessary in the interest of national defense, which certification shall be under such regulations as may be prescribed from time to time by the executive officials with the approval of the President."

I suggest, with deference, that the foregoing is a distortion of the grammatical construction of the statutory sentence. It leaves out significant words in the statute, as I have pointed out heretofore. For the statute says "only so much of the amount . . . as is properly attributable to such construction . . . as . . . the Secretary . . . has certified as necessary in the interest of national defense." Obviously the meaning is "such construction as the Secretary has certified as necessary"; therefore, that there shall be included only so much of the cost as is properly attributable to such construction, after the critical date, as has been certified as necessary. If that were not true, the word

"such" before the word "construction" would be without significance.

The opinion of the District Court continues thus:

"... Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost [estimated at 35%] in the case of facilities having presumptive post-war utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment in the defense effort which would not be available because of fear that such investment would have no postwar value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue."

This amounts to saying that Congress intended to write into § 124 the idea of value for post-war use which was the basis of amortization under a somewhat similar statute enacted in 1918.

Under the 1918 act, if a facility had post-war useful value the difference between that estimated value and actual cost was allowed as a special amortization deduction. The legislative history of the act now under consideration convincingly demonstrates that Congress deliberately and purposefully departed from the principle of the 1918 act because experience had demonstrated it to be unsatisfactory and not productive of the desired result.

I shall not prolong this dissent by going fully into the legislative history of § 124. One brief quotation from the testimony of the Assistant Secretary of the

Treasury before the Senate Finance Committee will suffice to indicate the understanding which Congress had of the section as shown by the entire voluminous legislative history.

"Senator George: Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amount to?"

"Mr. Sullivan: No, they do not."

"Senator George: They turn that back to the Treasury?"

"Mr. Sullivan: No, sir; under the bill automatically the amortization to which they are entitled is 20 per cent a year, for 5 years."

At the time this discussion took place, subsection (f)(1) had been passed by the House and after this testimony the only change was to eliminate any participation by the Council of National Defense, leaving the certifying power to the Secretaries of War and the Navy.

We should remember that the five-year amortization provision is in reality nothing more than an acceleration of the ordinary allowable depreciation which in the course of time would retire the property.

A proposal that the government shall own all property which has been fully depreciated at the ordinary allowable rate would be generally rejected as unsound. It is therefore illusory to suggest, as was done in argument, that the government should take over all facilities fully amortized in five years under § 124. A suggested inclusion in the act of a provision that the

government might acquire the facility at the end of amortization for the nominal consideration of \$1.00 was rejected during congressional consideration.

After exhaustive study, I have been able to discover nothing in the language of the act, or in its legislative history, to indicate the Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized. The result in this case is so incongruous as to be almost grotesque. Here the War Department, badly in need of large quantities of graphitar, insisted that the appellant erect a new building and equip it with the necessary machinery, which the appellant proceeded to do. The Secretary of War certified the building to have been necessary in the interest of national defense. It does not comport with common sense for the War Production Board in 1944 to certify that only 35 per cent of a fraction of the cost of the machinery was necessary in the interest of national defense. The building alone could not produce graphitar and yet the building was certified as necessary in its entirety. It is not suggested that the need for graphitar was any less pressing in 1944 than in 1943.

For the reasons given I think the decision of the court is wrong. The judgment of the District Court should be reversed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 37694

(Filed March 14, 1955)

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Floyd F. Toomey, Esq., and Karl Reimer, Esq., for the petitioner.

Clay C. Holmes, Esq., and James E. Markham, Jr., Esq., for the respondent.

Opinion/ MURDOCK, *Judge:*

* * * * *

War Facility Amortization.

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period; up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated

depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the certificates of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124 (a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31 1939, and with respect to which a certificate under subsection (f) has been made." Section 124 (f) (1) provides that in determining the adjusted basis of an emergency facility "there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after Decem-

ber 31, 1939, and that the provision may not be read "the cost attributable to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co. v. Harriman*, 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co. v. Sawyer*, 176 F. 2d 868, certiorari denied 339 U.S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp. v. United States*, 108 F. Supp. 616.²

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing in the language of the Act, or in its legisla-

² The Wickes Corporation was the successor to the United States Graphite Company. The cases also involved another issue which is not in the present case.

tive history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124 (f) (1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning of Judge Miller in his dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, J., dissents on the last issue on the authority of *United States Graphite Co. v. Sawyer*, (C.A., D.C., Cir.) 176 F. 2d 868, certiorari denied 339 U.S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co. v. United States*, (Ct. Cl.; Mar. 1, 1955) — F. Supp. —.

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IN THE
Supreme Court of the United States

October Term, 1955

THE UNITED STATES

v.

THE OHIO POWER COMPANY

**MEMORANDUM IN OPPOSITION TO PETITIONER'S RE-
QUEST FOR DEFERMENT OF ACTION ON ITS PETITION
FOR REHEARING**

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MEMORANDUM IN OPPOSITION TO PETITIONER'S REQUEST FOR DEFERMENT OF ACTION ON ITS PETITION FOR REHEARING

The petition of the United States for a writ of certiorari in this proceeding was denied on October 17, 1955. On November 10, the Solicitor General filed a document which he has entitled "Petition for Rehearing."

Respondent is mindful of the rule which provides that "no reply to a petition for rehearing will be received unless requested by the court." (Rule 58-3) Although the document filed purports to petition this Court for a rehearing, it is principally devoted to a

request for indefinite deferment of any action thereon. It is respondent's understanding that it is proper under the Court's rules to file a reply to such a request and this Memorandum is directed to answering petitioner's alleged reasons for deferment.

In the Solicitor General's own words, what the petitioner is asking is "that further consideration of this case be deferred" (p. 1) and that the case "be kept open, to await the outcome of the pending *National Lead* case in the Second Circuit," (p. 4) which he predicts is "likely" to be decided "by early next year" (p. 2). In substance it is a bold request that final disposition of the instant case be delayed while the Government attempts to develop a conflict where none now exists. As such, it is a violation of Rule 58 and is a contradiction of the Certificate of Counsel which states that the "petition for rehearing is presented in good faith and not for delay."

Petitioner's request for deferment is based on an improper foundation and it fails to state any valid reasons for deferment.

Petitioner's request for deferment is based solely on the assumption that this Court denied the writ because it had accepted respondent's contention that no conflict existed between the Court of Claims and the Court of Appeals for the District of Columbia Circuit. Respondent had assigned four reasons for the denial of the writ, three of which were the contra of the reasons which had been assigned by the petitioner for the granting of the writ. This Court has said that "A denial simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court." *Alexander Agoston v. Commonwealth of Pennsylvania*,

340 U.S. 844. See also *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912. This Court has also repeatedly said that no favorable or unfavorable inferences are to be drawn from the denial of a writ. These and other similar statements of the Court should preclude all guesses and assumptions as to why this Court has denied a writ. It is, therefore, improper for petitioner to ground a request for deferment on the assumption stated.

Inherent in the Government's request is the further erroneous assumption that if it can obtain a conflict this Court will grant a writ of certiorari as a routine matter. That is not in accord with either the rules or the practice of this Court. Rule 19; see *Commissioner v. Estate of Dix*, Oct. Term 1955, No. 363, cert. den. November 14, 1955; Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 466-468. Petitioner's improper assumption as to why this Court denied the writ relegates to impotency the fact that this Court undertakes discretionary review only where "there are special and important reasons therefor" (Rule 19). Mr. Justice Frankfurter, speaking for the majority of this Court in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 75 S. Ct. 614 (Oct. Term 1954, No. 28, announced May 9, 1955), said:

"Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Perhaps the Government in its zeal to create a conflict of decisions has forgotten that the statute here involved expired in 1945 and that similar legislation currently in force eliminates the question at issue. In these circumstances to grant the delay requested would elevate a possible conflict of decisions on an "episodic"

problem far above the more vital reason that certiorari is to be granted where it is necessary to settle an important current question of federal statutory law. The issue is now of as little special importance as it was when the Court denied certiorari on October 17. Only when and if petitioner's hoped-for conflict develops "early next year" will the time be ripe for determining whether such a conflict can convert an otherwise unimportant issue into one of sufficient stature to satisfy the "special and important reasons" required by the rule of this Court.

Petitioner states as his first reason for the deferment that "Since both parties are anxious to obtain an early decision, the [*National Lead*] case will be expeditiously handled, and it is likely that there will be a decision by early next year." The *National Lead* decision, which is in concurrence with the Court of Claims decision in the *Ohio* case, was promulgated by the Tax Court on March 14, 1955, which is only thirteen days after the Court of Claims handed down its decision in the *Ohio* case. While respondent does not know when and how the parties became anxious to obtain an early decision and decided to handle the case expeditiously, if the statement of the petitioner is accepted as correct there is no ground for deferment, because proper action can be taken when and if the petitioner secures its hoped for conflict "early next year."

Petitioner's second reason for deferment is to be found on page 3 where it is stated that "every decision on the question has been a divided one," and that this fact makes "it more than a mere possibility that the Second Circuit may reverse the Tax Court, thus creating a square conflict with the decision below." This hopeful reason for deferment is not justified. Two

Courts have considered this amortization issue on its merits, the Court of Claims, composed of five Judges, and the Tax Court, composed of sixteen Judges. One Judge from the Court of Claims and one Judge from the Tax Court dissented. Neither Judge wrote a comprehensive opinion in support of his view, and instead merely adopted the opinion of the District Court in the mandamus proceeding, which we submit is superficial and glosses over both the statutory language and the intent of Congress.

Petitioner implies that its request for deferment is in accord with what the Court did in *Olympic Radio and Television Co. v. United States*, 349 U.S. 232. But the situation in the *Olympic* case was entirely different. At the time the petition for a writ of certiorari was filed by the Government in the *Olympic* case there was a direct conflict on the issue between the decision below and the opinion of the Tax Court in the case of *Lewyt Corp. v. Commissioner*, 18 T.C. 1245. The Government so advised this Court in its petition for a writ.

In contrast to the *Olympic-Lewyt* situation, the Tax Court in its *National Lead* decision has agreed with the Court of Claims in the instant case. Thus, there is not even an incipient conflict.

When the petition for certiorari was filed, petitioner neglected to direct this Court's attention to the *National Lead* case. This omission was supplied by respondent's brief in opposition because it not only stated that, of the sixteen Judges of the Tax Court, fifteen, with only one dissenting, had promulgated a decision in accord with the Court of Claims decision in the *Ohio Power* case, but also included a copy of the opinion of the Tax Court in the Appendix. We submit that under these circumstances petitioner has no valid basis

for requesting a deferment on account of the *National Lead* case.

Respondent submits that petitioner's only purpose in attempting to obtain deferment of consideration of its so-called petition for rehearing is to take advantage of the deferment in presenting the *National Lead* appeal to the Second Circuit. If this Court agrees to the deferment, the Government will have maneuvered itself into a position where it can press upon the Second Circuit the fact that this Court is holding open the Government's petition for certiorari in this case in order to see whether a conflict of decisions develops. Certainly there can be no other purpose for such a request, because if a conflict should develop in the Second Circuit, then an appropriate opportunity arises to request this Court to consider whether the issue merits review solely because a conflict has developed.

It is respectfully submitted that petitioner's request for deferment should be rejected and that the petition for rehearing should be acted upon forthwith in order to avoid any improper inferences which might be drawn from a deferment in the circumstances.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, *Petitioner*

v.

THE OHIO POWER COMPANY

**BRIEF IN OPPOSITION TO MOTION OF THE
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I. This Court's Rule 58(4) provides:

“Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received” [Rule 58(4)].

The motion herein is a request to file a petition for rehearing, that is both consecutive and out of time under this Rule; in fact, it is the third effort of the Government to bring this particular case before this Court for review. Apart from other questions presented, this is completely dispositive of the Government's motion (pp. 2 to 13, below).

II. The Government's original petition for certiorari was not filed within the time allowed by law (28 U.S. Code Section 2101 (c)), and therefore it could not be granted by this Court even if the pending motion for leave to file a second petition for rehearing out of time were allowed (pp. 13 to 15, below).

III. Contrary to the Government's contention, there is no conflict between the Court of Claims' decision below and the recent decision of the Court of Appeals for the Second Circuit in *National Lead Co. v. Commissioner*, 230 F.2d 161. The Court of Appeals did not reach the question of law decided by the Court of Claims. The controlling fact established in the instant case is that the taxpayer had received a certificate certifying that the facilities listed therein were necessary *in their entirety* to the national defense. The comparable fact in *National Lead* was that "the Board never determined that the facilities . . . were necessary . . . in their entirety". The two decisions are governed by different legal principles because of these essentially different facts (pp. 15 to 22, below).

IV. The *National Lead* decision is not a substantial basis for the motion here, even if such motion were not both consecutive and out of time under this Court's Rules, because the issues presented are now stale and of no importance to the administration of the current revenue laws, the statute having expired in 1945 (pp. 23 to 24, below).

I

To Grant the Motion Would be Contrary to Rule 58(4)

This motion for leave to file a second petition for rehearing of denial of certiorari, made some five months after the time allowed under this Court's Rule 58(4), must be denied in accordance with the unequivocal directive of that Rule. The decision of the Court of Claims was entered on March 1, 1955 (R. 35-37; 131 Ct. Cls. 95, 129 F. Supp. 215), and the mandate for the amount of the money judgment was issued by that court on March 30, 1955 (R. 39). The Government's petition for certiorari in this case was filed on August 12, and denied on October 17, 1955 (350 U.S.

862). Twenty-four days later the Government filed a petition for rehearing, requesting that further consideration of the case be deferred until the decision of *Commissioner v. National Lead Co.*, then pending before the Court of Appeals for the Second Circuit. This Court denied that petition for rehearing on December 5, 1955 (350 U.S. 919). Now, fourteen months after the decision of the court below and five months after denial of its petition for rehearing and request that the case be held on the docket, the Government is again attempting to reopen the case in this Court. For the reasons set out below it is respectfully urged that this motion for leave to file a second petition for rehearing five months out of time must be denied.

1. The Government's motion does not refer to Rule 58(4), nor does it mention the 1948 amendment to the Judicial Code included in 28 U.S. Code Section 452. Because of its bearing on the proper interpretation and effect to be given to Rule 58(4), we shall first discuss this important change made in the Judicial Code.

Prior to 1948 this Court as well as the Courts of Appeals acted on the principles laid down in *Bronson v. Schulten*, 104 U.S. 410, 415:

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

"But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them.

..."

In that year, however, Congress enacted 28 U.S. Code Section 452, which reads:

"The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

"Court" is defined in the preceding section (Section 451) to include the Supreme Court.

That this statute eliminated the significance of the duration or termination of a term of court is beyond dispute. The language was taken over bodily from Rule 6(c) of the Rules of Civil Procedure (H. Rep. No. 308, 80th Cong., 1st Sess., p. A52), where it had been originally adopted to avoid the difficulties which were created by the expiration of the term of court at common law; it had thereafter been amended also "to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules". H. Doc. No. 473, 80th Cong., 1st Sess., p. 50; Moore's *Federal Practice* (2d Ed. 1948), pp. 1446-47.¹

In the light of this history, it has been suggested that the effect of this statute may even be to deprive the Court of power to grant petitions or motions which are filed out of time. See Wiener, *The Supreme*

¹ Rule 6(c) as originally adopted referred only to "expiration" of a term of court. After such decisions as *Hill v. Hawes*, 320 U.S. 520, 524, had indicated that courts were assuming that the continued existence of the term warranted action which would otherwise have been precluded by time limits imposed by other rules, however, Rule 6(c) was amended to provide specifically that "the continued existence", as well as the expiration of a term of court, does not affect the court's power. See H. Doc. No. 473, *supra*, p. 50. Wiener, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20, 84-86 (1954).

Court's New Rules, 68 Harv. L. Rev. 20, 85-86 (1954); cf. *R. Simpson & Co. v. Commissioner*, 321 U.S. 225. At the least, however, this provision plainly eliminates the duration as well as the termination of the term of court as a justification for granting or denying an out of time motion to disturb a final judgment, so that in the absence of a statutory provision prescribing a limit on the time within which action is to be taken with respect to a proceeding in this Court, litigants can rely only on the Court's own Rules.

2. Rule 58(4) thus assumes even more importance when considered in conjunction with the 1948 amendment to the Judicial Code. The explicit language of this Rule that consecutive and out-of-time petitions "will not be received" is further emphasized by the fact that it is new;² old Rule 33, adopted in 1947, as well as its predecessors, was silent on successive petitions and petitions out of time.

To grant the Government's motion will be in effect to negate Rule 58(4). The obvious purpose of this Rule is to stress the applicability to the final decisions of this Court of the same policy which lies behind the statutory limitations on the time within which appeals are to be taken:

"The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands.

² "The consecutive petition—the second, third, sometimes up to sixth—presents no problem; the Clerk will not receive them, period . . ." Wiener, *The Supreme Court's New Rules*, *supra*, at 84 (1954).

Any other construction of the statute would defeat its purpose. * * * Moreover, in such cases extension of the period for appeal could be limited only by recourse to the doctrine of laches, applied in the particular circumstances of each case" (*Matton Steamboat Co., Inc. v. Murphy*, 319 U.S. 412, 415).

Properly applied, the Rule is salutary; indeed, deciding matters such as this on the doctrine of laches would be intolerable for both the Courts and litigants before it. Certainly the Rule should be given more effect than as a simple directive to knowledgeable counsel that successive or out-of-time petitions for rehearing, to be acceptable, must be accompanied by a motion for leave to file them. Such a motion, of course, was in fact well known and customarily accompanied all out-of-time petitions, even under the old rules. See Stern & Gressman, *Supreme Court Practice*, 1st Ed., 1950, p. 323.

We do not mean to urge that by adoption of Rule 58(4) and the application of 28 U.S. Code Section 452 this Court has divested itself of discretionary power to entertain untimely petitions for rehearing in all cases. We do urge, however, that in the light of the changes which have been effected in both its Rules and in the applicable statutes this Court should no longer grant consecutive or out-of-time petitions for rehearing on the allegation of a belatedly developed conflict of decisions among the circuits. These changes make the line of cases relied on by the Government in which such petitions for rehearing were granted no longer authoritative. *E.g., Stone v. White*, 296 U.S. 550, 596, 298 U.S. 646, 300 U.S. 643. Those

decisions were obviously based on the common law rule of *Bronson v. Schulten*, *supra*, that empowered the Court to alter or vacate its judgment prior to expiration of the term and which forbade such action thereafter, since motions for leave to file petitions for rehearing after expiration of the term were uniformly denied on this ground. *E.g.*, *Art Metal Construction Co. v. United States*, 289 U.S. 706; *Hudson & Manhattan R.R. v. City of Jersey City*, 323 U.S. 812.

We recognize that, since the enactment of the 1948 amendment to the Judicial Code (but before the adoption in 1954 of Rule 58(4)) this Court has on one occasion granted certiorari on an out-of-time petition for rehearing on the basis of an intervening conflicting decision. *Clark v. Manufacturers Trust Co.*, 337 U.S. 953, 338 U.S. 241, 242.³ It would appear much more significant, however, that since the adoption of Rule 58(4) in 1954 this Court has not in fact on any occasion granted a consecutive or out-of-time petition for rehearing of denial of certiorari,⁴ although some 23 such petitions with accompanying motions for leave to file have been docketed and disposed of in that period. In seven of these instances the motions for leave to file petitions for rehearing each alleged, as

³ It does not appear that in this instance the 1948 statute was called to the Court's attention or that this question was raised or considered; it therefore "does not establish a construction of the statute." *R. Simpson & Co. v. Commissioner*, *supra*, 321 U.S. at 229.

⁴ In one instance, the motion for leave to file a petition for rehearing three days out of time was granted because of unusual circumstances constituting excusable delay, but the petition for rehearing itself was denied. *Born v. Laube*, 349 U.S. 932.

here, an intervening conflict.⁵ One of these (*Montadokota Gas Co. v. Montana-Dakota Utilities Co.*, 349 U.S. 969), is particularly pertinent because there this Court denied the motion for leave to file an out-of-time petition for rehearing of denial of certiorari even though the decision below had been expressly disapproved by an intervening and controlling decision of this Court (*Parissi v. Telechron, Inc.*, 349 U.S. 46, 47).

3. The enforcement by the Court of the principles of finality prescribed by its own rules in the light of 28 U.S. Code Section 452 is particularly appropriate in a situation such as this, where the prayer is for only a money judgment and where the final decision of this Court denying certiorari completely terminates the controversy. This is quite different from a motion to correct or otherwise amend a judgment or mandate of this Court in order to correct patent error. That was the situation in *Cahill v. New York, New Haven & Hartford RR*, May 14, 1956 and in *Boudoin v. Lykes Bros. S. S. Co.*, 348 U.S. 336, 350 U.S. 811, in each of which the original judgment of reversal, sent directly to the District Court, was recalled and amended to provide for remand to the appropriate Court of Appeals for further proceedings. In the *Cahill* case this Court drew a plain distinction between such motions and out-of-time petitions for rehearing, even though similar relief had previously been sought by a petition for rehearing in that case.

⁵ *Fraver v. Studebaker Corp.*, 348 U.S. 939; *Powell v. U. S.*, 348 U.S. 939; *Cowles Publishing Co. v. NLRB*, 348 U.S. 960; *Jones v. Lykes Bros. Steamship Co.*, 348 U.S. 960; *Lopiparo v. U. S.*, 349 U.S. 969; *Montadokota Gas Co. v. Montana-Dakota Utilities Co.*, 349 U.S. 969; *Zientek v. Reading Co.*, 350 U.S. 960.

After noting that its original order was erroneous, it stated:

“Rule 58(4) bars consecutive and out-of-time petitions for rehearing. The *Boudoin* case, however, concerned a motion to recall a judgment that asked for almost identical relief. Yet, if it had been considered a petition for rehearing it was filed out of time. The grant of the motion in the *Boudoin* case shows that Rule 58(4) does not prohibit motions to correct this kind of error.”

Again, in *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, the Court, instead of granting a second petition for certiorari in a continuing litigation with respect to segregation at a state university, amended and clarified on its own motion the mandate it had issued two years before.

Even out-of-time petitions for rehearing themselves present different questions when the mandate of this Court controls future conduct or the continuing custody of a prisoner. Furthermore, as the *Hawkins* case particularly illustrates, there are additional features of judicial administration to be weighed in dealing with requests for rehearing in litigations which are still in process. In the latter situation an out-of-time petition for rehearing must be considered in the light of the fact that the subsequent proceedings would themselves present an opportunity to bring the matter back to the Court, with full opportunity then for it to modify its earlier decision. Thus, in *Remmer v. United States*, 348 U.S. 904, criminal convictions in a so-called “net worth” case had been vacated and remanded by the Court on a narrow ground (347 U.S. 227). An unopposed but delayed petition for rehearing was granted by the Court and the original mandate modified in the light of later decisions of this

Court, without awaiting a second petition for certiorari.⁶

Here, however, unlike cases in which continuing litigation or future conduct is involved, the judgment for a sum of money brought the controversy between the parties finally and definitively to an end. Even in such cases, however, procedures are readily available to this Court to prevent its judgments from becoming final in any instance in which it believes that the interests of justice will be promoted by holding the case on its docket without disposition, whether to await the decision of another court or the happening of some other event. This procedure was recently followed, for example, in *United States v. Olympic Radio & Television, Inc.*, 348 U.S. 808, 349 U.S. 232, in which this Court retained a petition for certiorari on its docket without decision for over a year, awaiting a possible conflicting decision of a Court of Appeals (which in fact occurred). See Government's First Petition for Rehearing, filed November 10, 1955, p. 4, n. 1.⁷ Where the desirability of awaiting the development of a possible conflict outweighs that of an expeditious final decision, this procedure is always available.

⁶ In effect, the nature of the relief granted in the *Remmer* case made the motion more closely akin to the motion to amend the judgment in the *Cahill* and *Boudoin* cases than to the out-of-time petition for rehearing in the instant case.

⁷ See also, e.g., *Mitchell v. United States*, October Term 1953 No. 622, petition for certiorari filed March 5, 1954, certiorari denied June 7, 1954 (347 U.S. 1012), petition for rehearing filed within allowable time as extended; July 6, 1954, rehearing and certiorari granted, judgment below vacated and case remanded on January 10, 1955 (348 U.S. 905) for consideration in light of *Holland v. United States*, 348 U.S. 121, and other "net worth" cases decided December 6, 1954.

In fact, the Government actually requested that this be done in this particular case, by its first petition for rehearing filed on November 10, 1955. That petition fully set out the possibility of alleged conflict with the then pending case of *Commissioner v. National Lead Co.* In effect the Government is now asking this Court to reconsider the determination it made when it denied that request (350 U.S. 919). This plainly it should not do.

4. Sound procedure, as well as the Congressional policy expressed in other pertinent statutes, plainly calls for denial of the Government's attempt to reopen this proceeding at this stage. Had this case arisen in the Tax Court the Court would by statute have lost the power to reopen it when the Government's rehearing time expired under the Rules and its original timely petition for rehearing was denied, since decisions of the Tax Court are by statute made final "upon the denial of a petition for certiorari", which occurs when the rehearing time expires. *R. Simpson & Co. v. Commissioner*, 321 U.S. 225. There is no similar statutory provision applicable to the Court of Claims, but this Court should interpret its Rules so as to put all taxpayers on an equal footing if possible, regardless of the judicial route by which their tax liability is finally determined.⁸

⁸ Failure to use the date of denial of a timely petition for rehearing to mark the finality of a decision would create judicial confusion and conflict with Congressional policy in all Court of Claims cases. Title 28 U.S. Code Section 2515(b) provides that the Court of Claims, on motion of the United States, may grant a new trial "within two years after the final disposition of the suit" if it is able to show "that any fraud, wrong, or injustice has been done the United States." The two-year period in cases where certiorari is sought almost certainly now runs from the

5. If under the 1948 amendment to the Judicial Code (28 U.S. Code Section 452) and the new Rules, this Court is now to grant consecutive and out-of-time petitions for rehearing of denial of certiorari in civil actions of this sort on the ground that there has been an intervening conflicting decision, the precedent established is bound to breed uncertainty, confusion and delay. If the Court now decides that this case was not finally determined and closed when the Government's timely petition for rehearing was denied on December 5, 1955, it is hard to see when a litigant who has obtained what purports to be a final judgment may ever be secure in his position.

Prior to the 1948 amendment to the Judicial Code, litigants were on notice that a purportedly final judgment might be reopened during the remainder of the Court's term, and they also knew that if this were not done their judgment was secure when the term ended. Since the enactment of 28 U.S. Code Section 452, however, the termination of the term of court provides no basis for such reliance. Unless a judgment is to be final when it becomes so under the Rules of this Court, there is no basis for saying that it is final on the expiration of the term, or of the next term, or of the term

date of denial of a timely petition for rehearing or, if none is filed, from 25 days after the denial of certiorari. *Ex Parte Russell*, 13 Wall. 664, 669; *R. Simpson & Co. v. Commissioner*, *supra*. To entertain out-of-time petitions for rehearing would plainly upset the policy of Congress and create confusion as to when the "final disposition" occurs. Moreover, Congress has specified the extraordinary grounds for a reopening, and this Court has held a mistake of law, even when conclusively shown by a later controlling Supreme Court case, is not a statutory ground. *In re District of Columbia*, 180 U.S. 250.

after that. If this case may now be reopened, why should not the Government—or the taxpayer—also be entitled to reopen a denial of certiorari in any similar or related earlier case? *Cf. United States Graphite Co. v. Sawyer*, 176 F. 2d 868 (D. C. Cir., 1949), cert. denied 339 U.S. 964.

In addition to eliminating any definitive time of repose for final judgments, a decision of this Court granting the Government's motion would encourage dilatory tactics in the disposition and settlement of decided cases and would encourage procrastination and delay. Although in normal course the judgment here would have been paid within a period of a month or two after December 5, 1955, the Government has steadfastly refused to pay it in the obvious hope that a decision which it could assert to be in conflict might be handed down and that it might then obtain an out of time rehearing in this case on its petition for a writ. If this practice is sanctioned by this Court it can be anticipated that payment of all such judgments will be indefinitely held up wherever the Government considers that there is any possibility of the development of a conflict within the reasonably foreseeable future. Defeated private litigants, too, will be encouraged to adopt similar delaying tactics in the hope that a future conflict may still enable them to salvage their case. Such a rule would destroy rather than promote the sound administration of justice.

II

The Original Petition for a Writ was Filed Out of Time

As was suggested in our original brief in opposition to the Government's August, 1955 petition for certiorari (p. 2, n. 2) such petition cannot in any event be

granted because it was not filed within the time allowed by law. 28 U.S. Code Section 2101(c). (

The decision of the Court of Claims which settled all issues upon which recovery depended was entered on March 1, 1955 (R. 35-37, 129 F. Supp. 215). Since there remained only the relatively mechanical computation of the exact amount to be paid, the Court of Claims suspended the entry of judgment "to await the filing by the parties of a stipulation showing the amount due the plaintiff, according to our findings and opinion". The decision of March 1, 1955, was, however, a final judgment under the provisions of Court of Claims Rule 38(c).⁹

The Government's first application for an extension of time within which to file a petition for certiorari was accordingly out of time, since it was not presented to or acted upon by a Justice of this Court until June 17, 1955, some 108 days after entry of the appropriate final judgment. 28 U. S. Code Section 2101(c). Since this Court has recognized that a final judgment on liability entered under Court of Claims Rule 38(c) is the judgment which is reviewable on a timely petition for certiorari (*United States v. Calter (Philippines) Inc.*, 100 F. Supp. 970, 344 U.S. 149), a petition for certiorari which is out of time with respect to the entry of such a judgment cannot be sustained on the theory that

⁹ " . . . where the Court determines that a party is entitled to recover and the amount of the recovery is reserved for further proceedings, the judgment on the question of the right to recover shall be final, subject to proceedings had under Rules 53 [rehearings and new trials] and 54 [relief for clerical mistakes, excusable neglect, etc.]."

it is filed within the permissible time after entry of the Court of Claims' subsequent mandate for the amount of the money judgment. *Federal Trade Commission v. Minneapolis-Honeywell*, 344 U.S. 206, 211-217. See also discussion of this question with respect to a similar judgment of the Court of Claims in briefs filed in this Court on petition for certiorari in *United States v. Tanner*, October Term, 1955, No. 280, certiorari denied, 350 U.S. 842.

III

There Is No Conflict of Decisions

The recent decision of the Court of Appeals for the Second Circuit in *Commissioner v. National Lead Co.*, 230 F. 2d 161, is in fact distinguishable from the decision below in this case.

The fundamental facts of the instant case and of the *National Lead* case are essentially different. The issues decided by the Court of Claims below and by the Court of Appeals for the Second Circuit are different. Each decision is predicated upon its own facts.

The key to the important differences between these two cases is found in two different bases on which the War Production Board acted in issuing necessity certificates containing a percentage limitation on amortization: (1) When the *capacity* of a proposed facility was in excess of that necessary to national defense, a percentage limitation was placed in the certificate in order to deny the right of accelerated amortization to the excess capacity of the facility (WPB Circular No. 33, Criteria for Preparation of Recommendations for

Necessity Certificates,¹⁰ reprinted in Record on Petition for Certiorari in *United States Graphite Co. v. Sawyer*, No. 532, Oct. Term 1949, p. 85). (2) When the proposed facility was found necessary in its entirety to the national defense but it was reasonable to assume it would be useful also after the war, a percentage limitation on amortizable cost was placed in the certificate pursuant to the Board's illegal policy of limiting amortizable cost to the excess cost of war-time construction or acquisition as compared with normal or pre-war cost (WPB Circular No. 33, *supra*, included in part at R. 28-29).

Thus, two distinct types of percentage certificates were issued by the Board, although on their face they may be and often were identical in language. In the instant case, as well as in *Hickes Co. v. United States*, 108 F. Supp. 616 (Ct. Cls., 1952), the taxpayers obtained written statements from the certifying agent that the 35 percent of cost limitation contained in their certificates was imposed solely pursuant to the Board's policy of limiting amortization to excess cost of war-time construction where the entire facilities were necessary to the war effort but were presumed to have post-war utility (R. 5-7, 27-29).

In the *National-Lead* case, several certificates were involved, containing percentages varying from 35 to

¹⁰ Paragraph 3 c reads as follows:

"c. When the facility is clearly necessary to the war effort, but its capacity or cost is in excess of that which is necessary for the war effort, the percentage should be determined in such a way as to make no amortization allowance applicable to the excess capacity or cost."

50 percent (23 T.C. 988, at 1003). The record in *National Lead* fails to show what the percentages in those certificates represented. Without a statement from the certifying agent or other evidence as to the meaning of the percentages there is no proof that the Board ever determined that the entire capacity of the facilities was needed in national defense. Therefore, the Second Circuit properly predicated its decision on the fact that "the Board never determined that the facilities in question were necessary to the national defense in their entirety" (230 F. 2d, at p. 165).

In the instant case the fact was established that the Board had "duly certified that all of the items included in the application for a Necessity Certificate with respect to the Tidd project were necessary in the interest of national defense" (R. 8, 27-28, 33). In view of this established fact the Court of Claims was required to determine, under Section 124(f)(1) whether Congress had authorized the taxpayer to amortize the entire cost of facilities certified in their entirety or only the percentage of cost specified in the Board's limitation. If, as contended by the Government in the Court of Claims, Section 124(f)(1) granted the Board the dual authority to certify (1) the necessity of the facilities and (2) the percentage of the cost of those facilities which it might amortize under Section 124, then the taxpayer was not entitled to the additional amortization claimed. If, as contended by the taxpayer, Section 124(f)(1) granted the Board only the single authority to certify the necessity of the facilities and authorized automatically the amortization of the actual entire cost of the necessary facilities, then the taxpayer was entitled as a matter of law to the additional amortization deduction it claimed. The Court

of Claims faced this question and correctly resolved it in favor of the taxpayer.¹¹

The Court's decision was nothing more than an application of the long established principle clearly stated in *Dismuke v. United States*, 297 U.S. 167, at 172:

"... [T]he power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled."

Such decision of the court below in the instant case is not in conflict with the *National Lead* decision because the Second Circuit did not reach that question. That court, having based its decision on the fact that "the Board never determined that the facilities . . . were necessary to the national defense in their entirety," held that it need not pass upon the effect of Section 124(f)(1). Instead, it considered only whether the taxpayer could obtain from the Tax Court an accelerated amortization deduction for the entire cost of facilities never determined to be necessary in their entirety to national defense. The court ruled (230 F.2d at p. 165) (1) that the Tax Court could not "make the determination of necessity entrusted to the Board," and (2) that since the taxpayer had chosen "to accept the benefit of the partial certificate"

¹¹ This Court is respectfully referred to the Brief of Respondent in Opposition to Petition for a Writ of Certiorari filed on September 27, 1955, in the case at bar (pp. 13-22) for a summary of the reasons showing the correctness of the decision below.

without protest or challenge of the Board's power for ten years and had relied upon it in constructing the facilities, "it is now bound by its limitations." That the end result of the two decisions is contrary¹² on the essentially different facts is nothing new, and does not create the direct conflict of decisions with which this Court is concerned.

Neither of the legal principles set forth by the Second Circuit can be applied to the instant case; therefore there can be no conflict of decisions.

First, it has been amply demonstrated that the Second Circuit's proposition that no Court can make the determination of necessity entrusted to the War Production Board has no application to this case.

Nor does the second proposition set forth by the Second Circuit apply here. The facts of record in the two cases show conclusively that the acceptance of the limited certificates without protest and reliance thereon in undertaking the construction and acquisition of facilities were not present in the instant case. Thus, the principles of estoppel and laches laid down by the Second Circuit cannot be applied.

The facts in *National Lead* disclose that its necessity certificates were applied for and received at a time when the published regulations provided that certificates would not be granted unless they were applied for and the necessity of the facilities determined prior to the commencement of construction or the date of

¹² It is submitted that the Court of Claims in *Allen-Bradley Company v. United States*, 133 Ct. Cls. —, April 3, 1956, was referring only to this contrary result when it mentioned "the contrary decision" of the Second Circuit.

acquisition.¹³ There, the taxpayer, before commencing construction or acquisition, applied for and received certificates containing percentage limitations on amortizable cost. As the Second Circuit forcefully points out, it accepted those certificates without protest, acted upon them in 1944 and 1945, and raised no question with respect to their correctness until 1954, when it claimed "for the first time . . . that it [was] entitled

¹³ This regulation, promulgated with the approval of the President on October 5, 1943 (8 Fed. Reg. 13824) added to paragraph 3 of the prior regulations, a subparagraph providing as follows:

"d. The construction, reconstruction, erection, installation, or acquisition of a facility shall not be deemed necessary unless (1) the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of such facility was prior to October 5, 1943; or (2) an application for a Necessity Certificate describing such facility was filed before October 5, 1943; or (3) the Secretary of War or the Secretary of the Navy, in exceptional cases, has determined prior to the beginning of such construction, reconstruction, erection, installation, or the date of such acquisition, that there is a shortage of facilities for a supply required for military or naval uses and that it is to the advantage of the Government that additional facilities for such supply be privately financed."

Executive Order 9406 of December 17, 1943 (8 Fed. Reg. 16955), transferring the certifying authority from the Secretaries of War and Navy to the War Production Board, contained a provision which became a regulation of the War Production Board (8 Fed. Reg. 16964) in the following terms:

"(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations *unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.*" (Italics supplied)

to amortization of the entire cost of the facilities" (230 F. 2d, at p. 163). On these facts, plus the fact already referred to that the Board did not certify the facilities in their entirety, the Circuit Court concluded (*supra*, p. 165):

" . . . the taxpayer has forfeited his right to challenge the Board's action . . . Having accepted the certificate it is now bound by its limitations."

In sharp contrast, the taxpayer in the instant case commenced construction of its Tidd Project Emergency Facility in August 1943 (R. 21) before any such regulation was adopted and at a time when the statute (Sec. 124(f)(3)) and the regulations authorized and encouraged taxpayers to go forward with construction and to *apply* for certificates at any time within six months after commencement.¹⁴ After commencing construction in August, and having become obligated by contract for several million dollars for the project, the taxpayer here made timely application for its certificate on November 16, 1943. The certificate was not issued until nearly a year later, on November 9, 1944. Both at the time of application for the certificate and its issuance, the applicable regulations provided that none of the restrictions on certificates of necessity which had been first announced on October 5, 1943, would apply to construction commenced before that date (8 Fed. Reg. 13824, 10/5/43; Exec. Order 9406, 8 Fed. Reg. 16955, 12/17/43, Footnote 13, *supra*).

It had also been assured by the representations appearing in the Congressional Hearings held in con-

¹⁴ Construction, of course, could not have been commenced without first having obtained from the War Production Board priority certificates for the acquisition of the material necessary to construct the 100,000 kilowatt Tidd Project steam generating facility.

nection with the enactment of Section 124 and by public statements which had been made by the President and other high administration officials that if a taxpayer proceeded to invest its private capital in the construction of an emergency facility it would be entitled to amortize the full cost.¹⁵

The War Department in 1942, 1943 and 1944 had granted necessity certificates to this taxpayer for four other projects, all of which were begun prior to October 5, 1943. None contained any limitation upon amortizable cost (R. 19-20). Based upon this prior experience and the rights guaranteed in the statute and existing regulations, it started its construction and made its contract obligations under expressed policies which promised it the right to amortize also the entire cost of the Tidd project. After the certificate containing the illegal limitation was finally issued fifteen months subsequent to the commencement of construction, the taxpayer protested to the Board and demanded that the limitation be stricken (R. 6), but by then it was far too late for it to withdraw from completing the emergency facility.

Only when the Second Circuit or some other court, on the same fact situation as was presented in *Ohio Power*, reaches and answers the question decided by the Court of Claims to the contrary will there be a conflict with the *Ohio Power* decision.

¹⁵ Hearings before Senate Finance Committee on Second Revenue Act of 1940; 76 Cong. 3d Sess. (1940), pp. 124-125, 127, 158, 159, 167-168; H.R. Rept. No. 2894, 76th Cong. 3d Sess. (1940), p. 38; Congressional Record, August 29, 1940, p. 11240 (Rep. Boehlke), p. 11246 (Rep. Cooper); Joint Hearings before the House Ways and Means Committee and the Senate Finance Committee on Excess Profits Taxation, Amortization, etc., 76th Cong. 3d Sess., August 9-14, 1940, pp. 21, 29, 75-78.

IV

The Issue Is No Longer a Live One

The *National Lead* decision cannot be deemed a substantial intervening circumstance because the issues in both cases are stale and without importance to the administration of the current revenue laws.

The statute involved expired with the World War II excess profits tax law in 1945. In 1950 Congress enacted a new rapid amortization law as a part of the Excess Profits Tax Act of 1950 (Section 124A of the Internal Revenue Code of 1939), in which it added a new clause conferring upon the certifying agency for the first time the dual power to certify both (1) the necessity of the facilities, and (2) the amount of amortizable cost. Thus, a review by this Court will not aid in the administration of current law. See Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 466-468. The issue presented for review is "moribund" and "time [will] soon bury the question" (See dissent of Mr. Justice Frankfurter, in *Darr v. Burford*, 339 U.S. 200, 227).

Nor is the issue important in terms of pending litigation. Since last August, at our request, the Internal Revenue Service has furnished the names of the eight cases then asserted in its Petition for Certiorari (p. 8) to be pending in the lower courts. Undersigned counsel have examined those cases and find that two of them do not involve percentage certificates of any kind and that they raise an altogether different issue.¹⁶

¹⁶ *United States Pipe and Foundry Co. v. United States*, Court of Claims No. 245-54, involving a gross amount of \$1,314,851.03; *Milton Bradley Co. v. United States*, Dist. Ct. for D. of Mass., decided April 3, 1956, involving \$2,476.18.

Therefore, of the Government's list of eight, there are now only three undecided cases pending in lower courts including the Tax Court. How many of the 31 cases said to be pending at the administrative level actually involve the percentage amortization issue counsel does not know. In any event the Government has grossly inflated the amount involved by failing to take into account the recapture in later years of a substantial part of the taxes involved through disallowance of depreciation on facilities completely amortized during the war period.

V

Conclusion

Petitioner's Motion for leave to file a second consecutive and untimely petition for rehearing should be denied.

Respectfully submitted,

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No. 312

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, *Petitioner*

v,

THE OHIO POWER COMPANY

On Petition for a Writ of Certiorari to the United States
Court of Claims

**REPLY MEMORANDUM FOR THE OHIO POWER
COMPANY**

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**REPLY MEMORANDUM FOR THE OHIO POWER
COMPANY**

The Government has urged that our motion to vacate this Court's order of June 11, 1956 and to dismiss the continued petition for rehearing of denial of certiorari should not be decided now but should be held in abeyance pending this Court's decisions on the merits in the *Allen-Bradley* and *National Lead* cases. The Government has made no attempt to answer the arguments advanced in support of our motion, or to meet important and substantial questions raised by it. The only basis advanced for the Government's position is that if the *Allen-Bradley* and *National Lead* cases are decided in favor of the taxpayers, the Government's petition for rehearing which has been tenta-



tively restored to the docket could then properly be denied on the merits without passing upon the questions under this Court's Rules and the Judicial Code posed by the entry of the order of June 11, 1956. This is nothing more than an attempt to sidestep these questions, which, for the reasons indicated heretofore and herein, are necessarily raised by this Court's order of June 11, 1956 and should be decided by it.

In thus attempting to avoid consideration of the serious procedural problem posed by the order of June 11, 1956, the Government would in fact compound that problem. The action suggested would leave in full force and effect as a precedent and guide to counsel in future cases an order vacating after a lapse of over six months the denial of a petition for rehearing of denial of certiorari, apparently on the basis of the grant of certiorari in cases involving related issues. Unless this order is promptly vacated and the procedure which it impliedly sanctions is rejected, a serious doubt is raised, as to when the orders of this Court denying certiorari and rehearing become genuinely final. The sound administration of justice requires that counsel be guided, not misguided, by this Court's Rules, and that they be enabled with certainty to know the time within which the judgments and orders of this Court, whether favorable or adverse, may still be reopened.

The uncertainty as to finality resulting from the order of June 11, 1956, and some of the difficulties to which this gives rise, are further illustrated by another case now pending before this Court on petition for certiorari. *Item Co. v. NLRB*, No. 450 of this Term. In this case the Court of Appeals for the Fifth Circuit had ordered the enforcement of a continuing order

entered by the National Labor Relations Board against an employer, the Item Co. (220 F. 2d 956). Some months after this Court had denied a petition for certiorari to review this decision (October 10, 1955, 350 U.S. 836), and a petition for rehearing (November 21, 1955, 350 U.S. 905), the Court of Appeals for the Ninth Circuit on June 25, 1956 rendered an apparently conflicting decision. *NLRB v. F. W. Woolworth Co.*, 235 F. 2d 319. On the basis of this conflict, the Government promptly petitioned for certiorari in the *F. W. Woolworth* case, and such petition is now pending before this Court (No. 413).

Under these circumstances the precedent of this Court's order of June 11, 1956 in the *Ohio Power* case would appear to support a motion by *Item Co.* to vacate the order denying its petition for rehearing of denial of certiorari and to continue such petition for rehearing on the docket pending decision in the *F. W. Woolworth* case.* In fact, the *Item Co.* has not filed such a motion. Instead it has sought to accomplish substantially the same objective by going back to the Court of Appeals for the Fifth Circuit for the modification of that Court's decree in the light of the intervening decision in the *Woolworth* case and has then sought from this Court a writ of certiorari to review the Fifth Circuit's denial of such a motion.

In opposing this petition for certiorari the Government notes (p. 4) the existence of a question about the power of a court under the Judicial Code to reopen its final judgments after rehearing time has expired,

* While the alleged conflict in the *Item Co.* case did not develop until June 25, 1956, so that no such motion could have been filed prior to the end of the term, this would not seem a material difference in view of the fact that Section 452 of the Judicial Code has deprived the end of the term of all legal significance.

and urges that in any event only a "truly extraordinary showing" should justify such departure from "ordinary principles of finality." And the Government has taken the position in the *Item Co.* case that a subsequently developed conflict with the Court of Appeals of another Circuit is not such a "truly extraordinary showing." Such principles of course should be even more applicable in *Ohio Power*, which involves a money judgment, than in *Item Co.*, for at least in the *Item Co.* case the asserted conflict relates to a continuing enforcement order of the Court of Appeals.

The order of June 11, 1956 in the *Ohio Power Co.* is a radical departure from these principles—a departure which the Government sees fit to urge when it wants to reopen an adverse decision but which it decries when, as in the *Item Co.* case, the shoe is on the other foot. To allow this order to stand is to preserve what we believe to be an erroneous and mischievous precedent. If it remains uncorrected, it seems clear that responsible counsel cannot conscientiously advise their clients to accept the finality of denial of certiorari so long as there is a possibility of the development of a conflict within any reasonable time.

The time within which a denial of certiorari is to become final is not the kind of question which should turn upon the vague standard of reasonableness under the particular circumstances, a standard which every litigant will honestly believe should encompass his situation and which can be delineated only by the laborious process of case-by-case application. It should rather be definite and certain—plain to counsel and litigants as well as to the Court. Under Section 452 of the Judicial Code and this Court's Revised

Rules that time is perfectly plain and definite—it runs until a denial of a timely petition for rehearing or the expiration of the rehearing time. If it is not this, then only the vague standard of reasonableness remains.

The Government's position comes down to advising the Court to overlook this problem entirely, on the theory that the case may eventually be terminated for other reasons. If we are correct in our view as to the importance of the problem which is posed by the order of June 11, 1956, however, and the unfortunate effect on the administration of justice of letting it stand uncorrected, this suggestion must be rejected.

Furthermore, in its reply the Government has failed to make answer of any kind to the second ground supporting our motion to vacate the order of June 11, 1956, and has attempted to leave the impression that a decision on the merits in favor of the Government in *National Lead* and *Allen-Bradley* would require the same result in the *Ohio Power* case if the procedural problems are laid aside. As pointed out in our motion (pp. 20-44), whatever disposition this Court makes of the *National Lead* and *Allen-Bradley* cases, the decision below in *Ohio Power* cannot be adversely affected. This must follow because the Executive Order and the new administrative regulation of October 5, 1943, which are the Government's sole justification for the excess-war-cost percentage certificates in the *National Lead* and *Allen-Bradley* cases, were by their express terms inapplicable to Ohio Power's emergency facility. That the new regulation and the Executive Order can have no application to Ohio Power's emergency

facility is corroborated and underlined by the affidavit** of the Government official who supervised the issuance of excess-war-cost percentage certificates for WPB which states that the regulation of October 5, 1943, was expressly made inapplicable to construction commenced prior to that date "out of fairness to the applicant who had already spent his money or who had previously filed his application."

Holding this motion in abeyance will therefore solve nothing.

The motion to vacate this Court's order of June 11, 1956 and to dismiss the Government's continued petition for rehearing, filed November 10, 1955, should accordingly be granted, without awaiting the decision of the *National Lead* and *Allen-Bradley* cases on the merits.

Respectfully submitted,

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November 8, 1956

** This affidavit is a part of the record in the *National Lead* case (No. 124). It was first produced by the Government in the case of *U. S. Graphite Co. v. Harriman*, 71 F. Supp. 944 (Dist. Ct., D.C.) and was included in the Court of Claims record in *Wickes Corp. v. United States*, 108 F. Supp. 616 (Ct. Cls. 1952).

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FILED

FEB 12 1957

JOHN T. PEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, *Petitioner*

v.

THE OHIO POWER COMPANY

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR REHEARING**

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IN THE
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OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, *Petitioner*

v.

THE OHIO POWER COMPANY

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR REHEARING**

On January 28, 1957, this Court entered an order requesting The Ohio Power Company to file a response to the petition for rehearing in this case within fifteen days. Previously, on December 5, 1955, this Court denied the Government's petition for rehearing of a prior denial of a writ of certiorari, and on May 28, 1956 denied the Government's motion for leave to file a second petition for rehearing. On June 11, 1956, this Court *sua sponte* vacated the order entered on December 5, 1955, and continued the petition for rehearing (351 U.S. —). This action was presumably

taken to await the decision in the cases of *United States v. The Allen-Bradley Company* (No. 78) and *National Lead Co. v. Commissioner* (No. 124), writs of certiorari in which were granted on the same day. Both those cases were decided by written opinions delivered by the Court on January 22, 1957.

QUESTIONS PRESENTED

In *Allen-Bradley* and *National Lead* this Court decided that WPB had authority under Sec. 124 of the Internal Revenue Code of 1939 to promulgate a regulation dated October 5, 1943, and to apply that regulation to limit the amortization deductions for facilities necessary in their entirety to national defense to excess war cost where such facilities had presumptive post-war use. Accepting these decisions with respect to WPB's power to promulgate and apply this regulation, however, the additional and controlling issue presented here is the applicability of the regulation itself. There are also presented wholly unrelated procedural questions involving the timeliness of the Government's petition for a writ of certiorari and the finality of the denial by this Court of the Government's petition for rehearing. The questions now presented here are:

1. Even though WPB had statutory authority to promulgate its excess war cost regulation of October 5, 1943, did it erroneously apply the regulation to Ohio Power's facility, whose construction was commenced about two months prior to the adoption of the regulation, where that regulation and the Executive Order transferring certifying authority to WPB specifically provided that the regulation should not be applied to construction commenced prior to October 5, 1943?

2. Was the petition for a writ of certiorari to the Court of Claims timely when it was filed more than 90 days after the decision of that Court but within 90 days after the entry of the money judgment?

3. Was the litigation in *Ohio Power* brought to finality under the provisions of Rule 58(4) of this Court and of Section 452 of the Judicial Code when the Government's petition for rehearing was denied on December 5, 1955?

None of these questions was involved in either *Allen-Bradley* or *National Lead*.

STATUTES, EXECUTIVE ORDER AND REGULATIONS INVOLVED

With respect to the question presented here on the merits, there are included in a separately bound Appendix pertinent provisions of § 124 of the Internal Revenue Code of 1939 and Executive Order 9406 (8 F. R. 16955), dealing with the transfer of functions with respect to Necessity Certificates from the Secretaries of War and Navy to the Chairman of the War Production Board, as well as the full text of the War Department regulations, Issuance of Necessity Certificates (7 F. R. 4233) as they existed prior to amendment on October 5, 1943. The October 5, 1943 amendment is set forth separately.

With respect to the procedural questions involved, the separately bound Appendix includes a reproduction of the provisions of 28 U.S.C. § 2101 (c), relating to the time for applying for a writ of certiorari to this Court, and 28 U.S.C. §§ 451 and 452, relating to the expiration of a term of court as affecting the power of the court.

STATEMENT OF CASE

Ohio Power Company is engaged in generating and distributing electric power in the State of Ohio. During the war years pre-existing electrical generating facilities were inadequate to supply the war-inspired demand for power by defense industries in that area. Ohio undertook construction of a number of new facilities (R. 2-3).

To obtain the tax amortization benefits promised by Congress to private industry in Section 124 of the Internal Revenue Code of 1939 Ohio made five applications for Necessity Certificates. Four of those applications were approved and Certificates issued by the Secretary of War in 1942, 1943 and 1944. In each instance the Certificates were issued without any limitation whatever on the amount of cost which would be subject to tax amortization under Section 124 (R. 19-20).

In August 1943, Ohio commenced construction of a fifth expansion project to increase the war-time supply of electrical energy (R. 21). This project was the construction of a 100,000 kilowatt steam generating plant near Canton, Ohio, and was designated as the "Tidd Project Emergency Facility," having a cost in excess of \$11,000,000 (R. 3).

Within six months after the commencement of this construction, the time period specifically provided in Section 124(f)(3), Ohio filed its application for a Necessity Certificate covering the Tidd project (R. 3, 19). On December 17, 1943, the authority to issue certificates was transferred by the President from the Secretaries of War and Navy to the War Production

Board¹ (R. 3). The WPB did not issue a certificate to Ohio until November 9, 1944, at which time it certified that the Tidd project was necessary in its entirety to national defense but purported to limit the amount of cost entitled to tax amortization under Section 124 to 35 percent of the total cost of the project, which percentage represented WPB's estimate of excess war cost² (R. 4-7, 12-13, 19, 27-31).

In the meantime, construction work on the Tidd project had proceeded since August 1943 (R. 21)—a period of about fifteen months—and the project was carried forward as rapidly as possible to meet the continuing war need for electric power (R. 3, 8-9, 24-25).

Ohio filed a written protest with the WPB because of the percentage limitation in its Certificate and received from the certifying agency a written statement explaining that the 35 percent limitation had been included in accord with the rule of the War Production Board to limit amortizable cost to excess war cost where the necessary facilities could be presumed to be adaptable later to peacetime use (R. 4-6,

¹ Executive Order 9406, 8 F.R. 16964, amended by Executive Order, 9429, 9 F.R. 2487. See Appendix, p. 2, for pertinent provision of E.O. 9406.

² The record here shows the Board had "duly certified that all of the items included in the application for a Necessity Certificate with respect to the Tidd project were necessary in the interest of national defense," and that the 35 percent was a restriction on amortizable cost of the entirely necessary project, representing the excess of war-time cost over pre-war cost, which restriction was added by the Board because the project was presumed to have post-war utility (R. 4-8, 27-29, 33). This was so stated in a letter from the Chief of the Tax Amortization Branch in reply to the taxpayer's protest to the limitation on amortizable cost included in the certificate issued (R. 5).

27-31). Thereafter, Ohio protested that the Board had exceeded its legal authority in placing the cost limitation in the Certificate, and requested that the Certificate be corrected (R. 6). The certifying agency refused (R. 7). Ohio thereafter asserted its right to deduct the entire cost of the Tidd project in determining its tax liability for 1943, 1944, and 1945, but the Commissioner of Internal Revenue refused to allow the rapid amortization of more than 35 percent of cost. Suit in the Court of Claims followed.

As will appear hereinafter, in August 1943 when Ohio Power commenced construction work on the Tidd project, the amended regulation, which was the basis for the new rule for limiting the amortization deduction for emergency facilities to excess war cost (35 percent of total cost) in cases where such facilities had presumptive post-war use, had not been promulgated. Ohio Power obviously had no notice of this new rule at the time its construction work was started. When the regulation was published in the Federal Register on October 8, 1943, it clearly and specifically stated that it did not apply to construction commenced prior to October 5, 1943.

I. THE AMENDED REGULATIONS OF OCTOBER 5, 1943 DID NOT APPLY TO THE TIDD PROJECT BECAUSE CONSTRUCTION THEREOF HAD COMMENCED BEFORE THAT DATE.

A. THE AMENDED REGULATION OF OCTOBER 5, 1943 PROMULGATING THE EXCESS-WAR-COST RULE WAS NEVER INTENDED TO APPLY AND BY SPECIFIC LANGUAGE IN THE AMENDED REGULATION AS WELL AS EXECUTIVE ORDER 9406 DID NOT APPLY TO CONSTRUCTION COMMENCED PRIOR TO OCTOBER 5, 1943.

In August 1943 when Ohio Power commenced construction of the Tidd project, both the statute and the regulations prescribed by the Secretaries of War

and Navy specifically provided that taxpayers were entitled to commence construction of emergency facilities and make application for Necessity Certificates at any time within six months thereafter.³ The purpose of this statutory provision was to prevent delay in undertaking essential defense projects and to encourage private industry to go forward immediately with vital construction without waiting for administrative approval.⁴

In August 1943 the regulations of the Secretaries of War and Navy contained no provision of any kind requiring that certificates of necessity for facilities necessary in their entirety should limit amortizable cost to excess war cost in cases where the facilities had presumptive post-war use. See War Department Regulations, reproduced in full in Appendix, pp. 3 to 11.

However, on October 5, 1943, about two months after construction of the Tidd project had commenced, the Secretaries of War and Navy amended their regulations, with the approval of the President because of changed economic conditions which had developed in the summer of 1943. The change was designed to put a brake on further expansion of industrial facilities.

The parties are in agreement that WPB's new excess-war-cost rule was based on this amended regulation. In its Brief in *Allen-Bradley*, the Government states (pp. 22-23):

³ § 124(f) (3) of the Internal Revenue Code of 1939 (Appendix, at p. 1); War Department Regulations, Issuance of Necessity Certificates, ¶ 7 (Appendix, at p. 10). The provision in the regulations is substantially the same as in the Code. The Code provision was never amended after August 1943.

⁴ HR. Rept. No. 11, 77th Cong., 1st Sess., pp. 3-4.

"In essence, this [excess war cost] policy was based on the premise, explicitly stated in the regulations [amendment of October 5, 1943], that facilities were to be certified only if it was clearly in the Government's interest that they be privately financed. Hence, since any facility with clear post-war value could, if Government-financed, be readily disposed of at the end of the war, and since it was believed that, for the most part, sufficient plant capacity had already been achieved, it was concluded that, consistent with the criterion laid down in the regulations, only facilities having no post-war use would thereafter be given 100% certificates . . ."

The Government's petition for a writ of certiorari in this case confirms (p. 9) that it was upon adoption of the new regulation of October 5, 1943, that "the certifying agency began to issue less-than-100 percent necessity certificates, as well as to require that all further construction or expansion of facilities be approved in advance in order to qualify for the amortization privilege." This amended regulation of the War and Navy Departments authorized for the first time the pre-determination of necessity before making any construction or acquisitions, and also for the first time required the certifying agent to consider whether it was to the advantage of the Government to have the facilities privately financed and where the facilities had presumptive post-war use to limit the amortizable cost to excess war cost.

The invariable practice of the Secretaries of War and Navy prior to the amended regulation had been to certify what portion of the physical facilities was necessary to national defense and in no instance had they limited the amortizable cost of such facilities to excess-war-cost. This is consistent with the state-

ment of this Court in the *Allen-Bradley* opinion (p. 4) that "those who were responsible for the administration of the Act consistently interpreted § 124(f) as authorizing them to certify that only a part of the costs of construction after 1930 was necessary to the national defense." As the report of Under Secretary of War Patterson (Appendix, pp. 23 to 51, at pp. 44, 45) shows, in some instances the War and Navy Departments certified only part of a facility where the facility itself was of a size or capacity greater than was determined necessary in the interest of national defense, but this type of partial certification had nothing in common with the later practice of WPB of placing an excess-war-cost limitation upon the amortizable cost of facilities necessary in their entirety to national defense except that both were expressed in terms of percentages.⁵

An examination of the affidavit of Sidney T. Thomas, Acting Chief of the Tax Amortization Branch of the WPB⁶ as well as the report of Secretary Patterson,

⁵ Government Brief in *Allen-Bradley*, pp. 21-23, and n. 10, p. 22. The Patterson report states (Appendix, at p. 42):

"The cost of a facility was in general considered a matter in the discretion of the applicant so that if the facility was appropriate and necessary, inquiry was not made as to . . . the lowest possible price or cheapest . . . construction."

See also the Patterson report in the Appendix at pages 29, 31 and 42 to 45. Indeed, War Department Regulation ¶ 5b provided that the Secretaries of War and Navy would not certify the accuracy of the cost of any facility. Appendix, at pp. 5, 6, 8, 9.

⁶ The Thomas affidavit is reproduced in the Appendix to this Brief, pp. 12 to 60. It was introduced by the Government in *United States Graphite Co. v. Sawyer*, 339 U.S. 904 (Oct. Term, 1949, No. 532), and is also a part of the record in *Wickes Corporation v. United States*, 108 F. Supp. 616 (Ct. Cls., 1952), and in *National Lead Co. v. Commissioner*, S. Ct., Oct. Term 1956, No.

which was attached to the affidavit, will show that the amended War and Navy regulation of October 5, 1943, was a radical departure from the regulations as they existed prior to the amendment, and that great caution was taken by the Secretaries to avoid making the amendment retroactive. Also, in order to give industry proper notice and to avoid being unfair to industry, a provision was added to the amended regulation that beginning with October 5, 1943 all applications for necessity certificates had to be filed before making any constructions or acquisitions. Because this amended regulation represented a radical change in policy, the amendment of October 5, 1943 was given "extensive notoriety" in the press of the country.⁷

It is stated in the Thomas affidavit that the amended regulation of October 5, 1943 was not to apply retroactively "out of fairness to the applicant who had already spent his money or who had previously filed his application."⁸ By its express terms *it did not apply to construction commenced prior to October 5, 1943*. Construction on the Ohio Power Company Tidd project was commenced in August 1943 (R. 21).

On December 17, 1943 the President transferred, by Executive Order 9406 ((Appendix, at p. 2), the cer-

124. It is also reproduced in the *Allen-Bradley* Brief, Appendix B, pp. 1 to 53. The Thomas affidavit states that the excess-war-cost percentage limitation was predicated on Section 3-b-2 of Executive Order 9406 (8 F.R. 16955), which transferred the certifying authority to WPB. As hereinafter shown this Section in the Executive Order is in substance a restatement of the October 5, 1943, amendment to the regulations of the Secretaries of the War and Navy Departments.

⁷ Thomas affidavit, *id.*, at p. 17. See also Commerce Clearing House; *Standard Federal Tax Service* (1943) Vol. 3, ¶ 6533.

⁸ Appendix, at p. 16.

tifying authority under Section 124(f)(1) from the Secretaries of War and Navy to the Chairman of the War Production Board. This Executive Order restated the substance of paragraph d of the amended regulation of the War and Navy Departments dated October 5, 1943 (Appendix, at p. 11), and included a positive directive to the Board that the amended regulation was not to be applied in certifying construction begun prior to October 5, 1943. This Executive Order also directed that "the regulations of the Secretary of War and the Secretary of the Navy in effect prior to October 5, 1943 shall govern the issuance of Necessity Certificates for all . . . facilities the beginning of the construction . . . of which was prior to October 5, 1943."

We submit that the specific terms of the amended regulation of October 5, 1943 and Executive Order 9406 conclusively show that the new excess-war-cost rule was never intended to apply, and by specific language did not apply to construction commenced prior to October 5, 1943.

B. THIS COURT'S DECISIONS IN ALLEN-BRADLEY AND NATIONAL LEAD ARE INAPPLICABLE BECAUSE THE QUESTION HERE IS NOT THE STATUTORY AUTHORITY OF THE WPB BUT WHETHER THE BOARD ACTED HERE IN VIOLATION OF E.O. 9406 AND THE AMENDED REGULATION OF OCTOBER 5, 1943.

The rather extended statement under the foregoing point showing the nature and timing of the administrative regulations reveals the basic difference between the present case and the two cases decided last month by this Court. All of the Certificates of Necessity involved in those cases were applied for after the new regulation of October 5, 1943 was adopted and published. Likewise, no construction or acquisition

had taken place prior to October 5 and none occurred until after the percentage certificates were issued and until after the taxpayers were advised that certificates would be issued containing the excess-war-cost percentage limitation.

In short, the new regulation of October 5, 1943, the Executive Order of December 17, 1943, and the regulations of WPB were all, by their terms, fully applicable to the certificates issued in *National Lead* and *Allen-Bradley*. The taxpayers in those cases knew about the new regulation when they filed their applications for Necessity Certificates before commencing any construction or acquisition. They accepted excess-war-cost percentage certificates, made no protest to WPB, and thereafter constructed or acquired the facilities certified with full knowledge and acceptance of the limitation included in such certificates.

Ohio Power was caught in an altogether different set of circumstances. It commenced construction of the Tidd project in August 1943, at a time when the uniform administrative practice under the the regulations then in effect was to allow tax amortization of all the cost of certified facilities necessary in their entirety to the war effort; at a time when the announced policy was to induce private industry to build necessary facilities without waiting for the administrative red-tape of certification to be unraveled; at a time when the administrative regulations themselves specifically authorized the commencement of construction first and the filing of an application for a Necessity Certificate within six months thereafter; at a time when there existed no regulation or Executive Order of any kind authorizing the certifying agency to

consider post-war utility and to place an excess-war-cost limitation on the amortizable cost of construction necessary in its entirety to national defense during the war period. Moreover, the taxpayer here proceeded with construction of the Tidd project with assurance from the widely publicized regulation of October 5, 1943, as well as the Executive Order transferring the certifying authority to the Board, that the new policy did not apply to construction commenced prior to October 5, 1943.

As the Court points out in its opinion in *Allen-Bradley* (at p. 5), after this excess-war-cost policy was adopted in 1943 "certificates issued for only a portion of the cost of necessary facilities were accepted by business in general, and respondent in particular—apparently without substantial objection." But this statement has no application to Ohio Power. *Allen-Bradley*, National Lead and other taxpayers commencing construction or making acquisitions after October 5, 1943, were put on notice that the Government had adopted a new policy of considering the financial advantage of private financing of new facilities acquired after that date, the result of which was that only the amount of excess war cost would be subject to rapid amortization. Applicants for certificates after October 5, 1943, where there had been no construction commenced or acquisitions made prior to that date, were required to obtain a certificate before commencing construction or making acquisitions and therefore had a choice of proceeding or not proceeding in light of the new limited policy. Ohio Power had no such choice for two reasons, (1) for its construction was commenced at a time when the announced policy was

to encourage taxpayers to commence construction or make acquisitions and apply any time within six months thereafter for certificates, and (2) the new regulation, which gave Ohio Power no warning because it was specifically made inapplicable to projects commenced prior to October 5, 1943, was not applied by WPB to its construction until the project had been under way for well over a year. It was because of this that the amended regulation was expressly made inapplicable to construction and acquisitions commenced and made prior to October 5, 1943.

The Government in its brief to this Court in the *Allen-Bradley* case expressly states that the excess-war-cost percentage policy was based on the new regulation (Govt. Brief, pp. 21-23), and that the 35 percent of cost limitation was "a deliberate policy adopted" to effectuate the new regulation and Executive Order (Govt. Brief, pp. 54-55). Consequently, the decision of this Court in *Allen-Bradley* and *National Lead* that such policy was authorized under the statute can have no application here. For in no uncertain terms the new regulation of October 5, as approved by the President, and the same requirement in the later Executive Order were expressly made inapplicable to construction commenced before October 5, 1943, as was the Tidd project. Thus, even though WPB had the power to limit amortizable cost prospectively in accordance with the policy adopted in the new regulation, as this Court has held in *Allen-Bradley* and *National Lead*, obviously it could not exercise that power in this case retrospectively in violation of the Executive Order prescribing its authority and of the administrative regulation approved by the President.

The action of the Board in applying the excess-war-cost limitation here, where construction was commenced prior to October 5, 1943, is in violation of the Executive Order and flies in the teeth of the regulation; it was "lawless and beyond its jurisdiction." See *Estep v. United States*, 327 U.S. 114, 121.⁹

II. THE PETITION FOR REHEARING SHOULD BE DENIED BECAUSE THE ORIGINAL PETITION FOR A WRIT WAS FILED OUT OF TIME.

The written opinion of the Court of Claims in this case was handed down on March 1, 1955. The Government took no action until more than 90 days after that date; on June 17, 1955, it applied to this Court for an extension of time, in which to file a petition for a writ of certiorari. The request for extension was timely filed if the proper date for filing begins to run from March 30, 1955, when the Court entered the monetary judgment. Rule 38(c) of the Court of Claims provides, in substance, that its decision determining the rights of the parties constitutes its final judgment.

⁹ The Board's action in applying the excess-war-cost rule to the Tidd project, construction of which was commenced prior to the date of the amended regulation, violates elementary notions of fair play. By its express terms, the amended regulation applied only prospectively. A changed regulation unlimited as to its effective date of application has frequently been condemned when applied to prior conduct. *Arizona Grocery Co. v. Atchison T.S.R. Co.*, 284 U.S. 370; *Miller v. United States*, 294 U.S. 435; *Helvering v. R. J. Reynolds Tob. Co.*, 306 U.S. 110; *NLRB v. Guy Atkinson Co.*, (CA 9, 1952) 195 F. 2d 141, Note, 66 Harv. L. Rev. 348 (1952); cf. *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 610; *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, rehearing den. 308 U.S. 638. See Vom Bauer, *Federal Administrative Law* 491. (1942); Griswold, "A Summary of the Regulations Problem," 54 Harv. L. Rev. 398 (1941). Cf. Cardozo, *The Nature of the Judicial Process*, 147 (1920).

We submit that there cannot be two dates for the beginning of the 90 day period for filing petitions for writs of certiorari to the Court of Claims.

We continue to urge that the Government's original petition for certiorari cannot in any event be granted because it was not filed within the time allowed by 28 U.S.C. Sec. 2101(c). We will not repeat our argument here, which is set forth in our original Brief in Opposition to the Government's Petition for Certiorari (p. 2, n. 2), and our Brief in Opposition to Motion of the United States for Leave to File a Petition for Rehearing, filed May 16, 1956 (pp. 13-15). We believe, however, that the merit of our position has been underscored by the recent decision of the full bench of the Court of Appeals for the Second Circuit in *F. & M. Schaefer Brewing Co. v. United States*, 236 F. 2d 889 (1956), dealing with the timeliness of appeals under comparable provisions of the Federal Rules of Civil Procedure. Accord: *Matteson v. United States*, P-H Fed. Tax Service, ¶ 140,359. An apparently conflicting decision has been reached by the Court of Appeals for the First Circuit. *United States v. Higginson*, 238 F. 2d 439 (1956), and the Government has filed a petition for a writ of certiorari in the *Schaefer Brewing Co.* case (O.T. 1956-No. 761).

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III. THE PETITION FOR REHEARING SHOULD BE DENIED BECAUSE THIS COURT'S DENIAL OF THE PETITION FOR REHEARING ON DECEMBER 5, 1955 BROUGHT THE LITIGATION IN THE OHIO POWER CASE TO FINALITY UNDER THE RULES OF THIS COURT AND THE JUDICIAL CODE, AND TO REVIVE THAT PETITION VIOLATES THOSE RULES AND ESTABLISHES A NEW PRECEDENT WHICH WILL IMPEDE THE ADMINISTRATION OF JUSTICE.

In our "Motion to Vacate Order of June 11, 1956 and to dismiss petition for rehearing filed November 10, 1955," filed with this Court on October 12, 1956, we urged that this Court's denial of the petition for rehearing on December 5, 1955 brought the litigation to finality under the clear and specific provisions of Rule 58(4) of this Court and of Section 452 of the Judicial Code. In its memorandum of October 1956 (p. 2) in response to this motion, the Government did not reply to our arguments but instead requested the Court to hold this issue in abeyance pending decision of *Allen-Bradley* and *National Lead*, since a decision for the taxpayers in those cases would make unnecessary any further consideration of this question.

Our argument on this point is fully set forth in the above document on pages 7 to 20, inclusive, and accordingly will not be repeated here. For the reasons there

set forth, however, we believe that at this time, over a year after denial of the Government's initial petition for rehearing of denial of certiorari and some seven months after denial of a motion for leave to file a second and out-of-time petition for rehearing (351 U.S. 958), this Court should not reconsider this case on the merits. To do so would violate the fundamental principles of finality contained both in its rules and in the provisions of the Judicial Code.

CONCLUSION

The continued petition for rehearing of denial of certiorari should be denied because (1) the decision below is plainly correct on the facts presented and should not be disturbed; (2) the Government's original petition for certiorari was not filed within the time prescribed by applicable law; and (3) the decision of this Court denying the Government's timely petition for rehearing of denial of certiorari on December 5, 1955 terminated the litigation under this Court's rules and the provisions of the Judicial Code, and should not now be reconsidered.

If, however, this Court should disagree with us and should grant the pending petition for rehearing and the petition for certiorari, we respectfully urge that this cause be set down for argument on all of the substantive and procedural questions herein presented. The deliberate application of a regulation contrary to its expressed limitations is a matter of such importance that it should not be sanctioned without opportunity for full briefs and argument. The question of the proper meaning and effect of the principles of finality embodied in this Court's Rule 58(4) and Section 452 of the Judicial Code presents a ques-

tion of great importance to the sound and efficient administration of justice. The same can be said for the issue as to when a judgment of the Court of Claims becomes final, for purposes of certiorari, and the relationship of that question to the issue now pending before the Court in the *Schaefer* case. On both of these latter issues an opinion of this Court, rendered after full argument, is urgently needed for the enlightenment and guidance of litigants and of the Bar.

Accordingly, we submit that this case is not one for which summary disposition upon grant of certiorari is appropriate. In the event, however, that summary disposition on the merits is nevertheless to be ordered, we respectfully urge that the proper procedure would be not to reverse the judgment of the Court of Claims on the authority of *Allen-Bradley* and *National Lead*, but rather to vacate the judgment of that Court and remand the cause for consideration of the questions peculiar to this litigation which were not reached by that Court when the cause was last before it. Cf. *Mitchell v. United States*, 348 U.S. 905.

Respectfully submitted,

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JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, *Petitioner*,

v.

THE OHIO POWER COMPANY.

APPENDIX
To Brief of Respondent In Opposition To
Petition for Rehearing

(

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APPENDIX

Internal Revenue Code of 1939, § 124(f):

“(f) Determination of Adjusted Basis of Emergency Facility.—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

“(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

“(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before December 1, 1941, whichever is later, . . .”

28 U.S.C. § 451:

“§ 451. *Definitions.*

“As used in this title:

“The term ‘court of the United States’ includes the Supreme Court of the United States, . . .”

28 U.S.C. § 452:

“§ 452. *Courts always open; powers unrestricted by terms.*

“All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.

"The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding. (June 25, 1948, ch. 646, § 1, 62 Stat. 907.)"

28 U.S.C. § 2101:

"§ 2101. *Supreme Court; time for appeal or certiorari; docketing; stay.*

* * * * *

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

* * * * *

Executive Order 9406 (December 17, 1943). Transfer of Functions With Respect to Necessity Certificates From the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board (8 Fed. Register 16,955):

* * * * *

"3. (a) The regulations of the Secretary of War and the Secretary of the Navy in effect prior to October 5, 1943 shall govern the issuance of Necessity Certificates for all applications for Necessity Certificates describing facilities the beginning of the construction, reconstruction, erection, installation or the date of acquisition of which was prior to October 5, 1943.

✓ "(b) In acting upon applications for Necessity Certificates filed on and after October 5, 1943 describing facilities the construction, reconstruction, erection or installation of which was not begun or which were not acquired prior to October 5, 1943, Necessity Certificates shall not be issued unless the Chairman of the War Production Board has determined prior to the beginning of the construction, reconstruction, erection, installation, or the date

of acquisition of the facilities (1) that the facilities to be constructed or acquired are clearly necessary for the war effort, and (2) that it is to the advantage of the Government that such additional facilities be privately financed."

* * * * *

**War Department Regulations, Issuance of Necessity
Certificates (7 Fed. Register 4233):**

REGULATIONS PRESCRIBED BY THE SECRETARY OF WAR AND THE SECRETARY OF THE NAVY, WITH THE APPROVAL [SIC] OF THE PRESIDENT, GOVERNING THE ISSUANCE OF NECESSITY CERTIFICATES UNDER SECTION 124 (f) OF THE INTERNAL REVENUE CODE

1. *Introductory.* Section 124 of the Internal Revenue Code allows a deduction to corporations, in the computation of taxable income, for the amortization of the cost of emergency facilities over a period of sixty months or less. Allowance of the deduction is subject to certain conditions which include the issuance of Necessity Certificates by the Secretary of War or the Secretary of the Navy under regulations from time to time prescribed by them with the approval of the President. The following are the regulations so prescribed.

'Regulations governing other features of Section 124 have been promulgated by the Bureau of Internal Revenue.

2. *Definitions.* As used throughout these regulations

a. "Emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection or installation of which was completed after June 10, 1940, or which was acquired after such date, and with respect to which a Necessity Certificate has been made.

b. "Emergency period" means the period beginning June 10, 1940, and ending on the date on which the President proclaims that the utilization of a substantial portion of the emergency facilities, with respect to which Necessity Certificates have been made, is no longer required in the interest of national defense.

c. "Taxpayer" means a corporation as that term is defined in section 3797 (a) (3) of the Internal Revenue Code.

d. "Certifying authority" means the Secretary of War or the Secretary of the Navy, as the case may be, or the duly authorized representative of either.

e. "Commissioner" means the Commissioner of Internal Revenue.

f. "Necessity Certificate" means a certificate made pursuant to Section 124 (f) of the Internal Revenue Code, certifying that the construction, reconstruction, erection, installation or acquisition of the facilities, referred to in the certificate, is necessary in the interest of national defense during the emergency period.

g. "Supply" means any article, product, material or service.

3. *Determination of necessity.* In determining whether the construction, reconstruction, erection, installation or acquisition of a facility is necessary in the interest of national defense during the emergency period, and that a Necessity Certificate may therefore be issued, the certifying authority will be guided by the following considerations:

a. *Supplies required for national defense.* The certifying authority will consider whether the supply to be produced with the facility sought to be certified is required in the interest of national defense during the emergency period. A supply may be found to be so required if it—

i. is essential to the armed forces of the United States or auxiliary personnel, including civilian defense;

ii. is intended for any nation which may be furnished supplies under any act of Congress or any authorization of the President, or

iii. has only civilian use, but such use (1) will contribute to the release of supplies required in the in-

terest of national defense; (2) is necessary for the operation of defense facilities, or (3) is otherwise in the interest of national defense; *Provided*, That any certification of facilities used for the production of purely civilian supply should conform to policies of the War Production Board, or any other appropriate defense agency.

b. Shortage of supplies required for national defense.

i. *General rule.* The certifying authority will consider whether, at the time of the expansion or conversion, or at the time of the issuance of the Necessity Certificate, there is an existing or prospective shortage of facilities for the production of the supply which is to be produced by the facility sought to be certified. Every attempt should be made to utilize existing productive capacity in the United States for the production of supplies required in the interest of national defense, through the medium of prime contracts, subcontracts, conversion or otherwise before expansion of facilities for emergency purposes is undertaken. As a general rule, facilities will be certified only if—

(1) an overall shortage exists or is in prospect in the industry producing such supply (no such shortage will be found to exist if the required increase in production could be accomplished substantially as well by an increased or more efficient use of existing plant) and

(2) facilities are not available outside such industry which as a practical matter may be used directly or after adaptation or conversion for the production of such supply.

ii. Exceptions.

(1) *Impracticability of using existing facilities elsewhere.* Existing capacity will be regarded as insufficient if, notwithstanding an apparent adequate capacity, facilities are lacking in a particular region and that lack cannot readily be met by surplus capacity in other regions because of

- (a) the excessive cost of transportation;
- (b) the need for transportation facilities for other products, or
- (c) the desirability of insuring a regional supply.

(2) *Special need by the taxpayer.* In unusual cases existing capacity may be regarded as insufficient if, notwithstanding the existence of an apparent adequate capacity, facilities to produce supplies necessary for national defense are needed by a taxpayer whose qualifications for the manufacture of a special product are recognized as essential to the defense program.

c. *Other considerations.* The certifying authority will be guided by the following additional considerations:

i. *Depreciable assets.* With the exception of land, facilities will not be certified unless they are subject to the deduction provided for by Section 23 (1) of the Internal Revenue Code.

ii. *Land.* Land will not be certified as necessary unless directly related to the production, storage, transportation or protection of supplies required in the interest of national defense.

iii. *Acquisition of going concern.* Acquired facilities previously constituting the principal productive assets of a going concern will not ordinarily be certified unless there is a reasonable prospect of a substantial increase in the usefulness of such facilities resulting from such acquisition and such increase cannot satisfactorily be obtained through subcontracting or unless a probable substantial loss of usefulness would result except for such acquisition.

Exceptions may be made under special circumstances in the case of transfer of ownership of facilities when such facilities were constructed, reconstructed, erected, installed, or acquired by a transferor after the beginning of the emergency period.

iv. *Conversion of non-defense facilities to defense purposes.* In cases where a taxpayer has expanded its facil-

ities to maintain nondefense production because facilities previously so employed were converted to defense work, such expansion will be considered for certification only to the extent of such conversion.

v. *Replacements.* If it is established that replacements would have been made, at or about the time made, regardless of the emergency, they will not be eligible for certification.

4. *War Production Board.*

a. *Function.* The War Production Board, which has assumed the functions of the Tax-Amortization Committee, an advisory committee in the Office of Production Management established at the direction of the President on November 11, 1941, will examine the work of the Tax-Certification Sections of the War Department and the Navy Department and will assist from time to time in the direction of their policies relating to issuance of Necessity Certificates, in order to coordinate the administration of the law with the declared policy of using all available productive capacity. Recommendations may be made by the War Production Board to the Secretary of the War and the Secretary of the Navy or to the President concerning such changes in these regulations as it may deem necessary. A staff representing the War Production Board will examine the work of the Tax-Certification Sections of the War Department and the Navy Department in such detail as may be necessary to keep the War Production Board advised of the administration of the law with regard to the use of available productive capacity, and to make recommendations on certain applications as hereinafter set forth.

b. *Procedure.* The certifying authority will transmit to the War Production Board or such other Government department or agency as the War Production Board may designate, for recommendation, a copy of each application involving (a) facilities estimated by the taxpayer to cost in excess of \$250,000 or such greater amount as may be fixed from time to time by the War Production Board or (b) new questions of policy relating to available productive

capacity as such questions may be defined from time to time by the War Production Board and communicated in writing to the certifying authority. The War Production Board or such other Government department or agency will make its recommendation within two weeks after receipt of the copy of the application, provided that the certifying authority and the War Production Board may in particular cases agree upon a longer period, and provided further that in exceptional cases the certifying authority may require action in a shorter period. In any such case, no action will be taken by the certifying authority until the War Production Board or such other Government department or agency has made its recommendation as to the disposition of such application or has notified the certifying authority that it will make no recommendation, or until such period has expired. If the certifying authority does not intend to follow the recommendations of the War Production Board or such other Government department or agency, or if he has not received such recommendation or notification within the time limits stated above, the certifying authority will notify the War Production Board before taking final action. In any such case in which the certifying authority has not followed the recommendation, he will make available to the War Production Board a complete file on the application and will transmit to the War Production Board a report stating the reasons for the action taken.

5. Effect of Necessity Certificate.

a. General rule. A Necessity Certificate is conclusive evidence of certification by the certifying authority that the facilities therein described are necessary in the interest of national defense, up to the percentage therein designated of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof after June 10, 1940.

b. As to descriptions, costs and dates. The certifying authority will not certify the accuracy of the cost of any facility or of any date relative to the construction, recon-

struction, erection, installation or acquisition thereof. It will be incumbent upon taxpayers electing to take the amortization deduction to establish to the satisfaction of the Commissioner the identities of the facilities, the costs thereof and the dates relative thereto, except that in the case of Emergency Plant Facilities contracts the certifying authority will furnish the Commissioner with a copy of the Final Cost Certificate.

c. *As to Emergency Plant Facilities Contracts.* An application for a Necessity Certificate and any Necessity Certificate issued with respect to emergency facilities made the subject of any Emergency Plant Facilities contract will be deemed to cover all of the facilities purchased pursuant to such contract and any amendment or supplement thereto.

d. *Further description after certification.* Where after the completion of an expansion the taxpayer finds that the description or cost of any facility appearing in the Necessity Certificate materially varies from the actual description or cost of the facility, a statement should be filed by the taxpayer with the certifying authority setting forth the correct description or cost of the emergency facility actually constructed, reconstructed, erected, installed or acquired. A copy of the statement will be forwarded by the certifying authority to the Commissioner, provided the description or cost in the opinion of the certifying authority is within the scope of the original certification, and when so forwarded, the statement will have the effect of an amendment of the original certificate.

6. *Form of application.* The standard form of application for a Necessity Certificate with accompanying instructions may be obtained from the certifying authority. In cases where time does not permit preparation of a formal application, an informal written application will be accepted, pending the filing of a formal application. The formal application need not follow the standard form nor repeat any of the language of these regulations; but it

should clearly and concisely set forth the information called for in the standard form, with particular reference to such of the considerations set forth in Article 3 of these regulations as may be relevant to the application. The applications must be sworn to by a duly authorized officer of the corporation, and should give the name of the person authorized to represent the taxpayer for the purpose of the application.

7. *Place and time of filing of application; making of election.* An application for a Necessity Certificate is filed when received at the office of the certifying authority in Washington, D. C., or at any other office designated by the certifying authority. The application must be thus filed within six months after the beginning of the construction, reconstruction, erection, or installation, or the date of acquisition, of the facilities sought to be certified, or before December 1, 1941, whichever is later. The application should be filed in time to enable the certifying authority to issue a Necessity Certificate before expiration of the taxpayer's time of making of election, as set forth in Section 124 (f) (3) of the Internal Revenue Code, which provides, in part, as follows: "... that in no event and notwithstanding any of the other provisions of this Section, no amortization deduction shall be allowed in respect of any emergency facility for any taxable year unless a Certificate in respect thereof under paragraph (1) of the Subsection shall have been made prior to the making of the election; pursuant to Subsection (b) and (d)(4) of this Section, to take the amortization deduction and begin the sixty month period in or with such taxable year ..."

8. *Necessity Certificates previously issued.* All Necessity Certificates issued by the certifying authority prior to the effective date of these regulations are hereby ratified and confirmed. Any statements heretofore forwarded by the certifying authority to the Commissioner in conformity with Article 5-d hereof will be deemed to have had the effect of an amendment of the original certificate to which it relates.

9. *Amendment of regulations.* These regulations may be amended by the Secretary of War and the Secretary of the Navy with the approval of the President.

HENRY L. STIMSON,
Secretary of War.

FRANK KNOX,
Secretary of the Navy.

Approved:

FRANKLIN D. ROOSEVELT,
President.

5/22/42

**October 5, 1943 Amendment to War Department Regulations.
Which Added Subparagraph 3-d (8 Fed. Register 13,824):**

"d. The construction, reconstruction, erection, installation, or acquisition, of a facility shall not be deemed necessary unless (1) the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of such facility, was prior to October 5, 1943; or (2) an application for a Necessity Certificate describing such facility was filed before October 5, 1943; or (3) the Secretary of War or the Secretary of the Navy, in exceptional cases, has determined prior to the beginning of such construction, reconstruction, erection, installation, or the date of such acquisition, that there is a shortage of facilities for a supply required for military or naval uses and that it is to the advantage of the Government that additional facilities for such supply be privately financed."

**Affidavit of Sidney T. Thomas, Chief, Tax Amortization
Branch, Civilian Production Administration**

CITY OF WASHINGTON, DISTRICT OF COLUMBIA, SS:.

I, Sidney T. Thomas, being duly sworn, do hereby depose and say:

1. I am the duly appointed Chief of the Tax Amortization Branch of the Civilian Production Administration and prior to that was Acting Chief of said branch of the War Production Board since December 26, 1943.

2. In that position, I have been delegated authority by the Chairman of the War Production Board and his successor the Administrator of the Civilian Production Administration,¹ to consider applications for Necessity Certificates and to issue Necessity Certificates or to disapprove of such applications in accordance with the policies and regulations established by the Chairman of the War Production Board and the Administrator of the Civilian Production Administration under Section 124 of the Internal Revenue Code.

3. The statements made in this affidavit are based upon information received by me in my official capacity and which I believe to be true and accurate.

4. In order to give the necessary background of the tax amortization program, I quote from the Report of the then Under Secretary of War Robert P. Patterson to the Secretary of War dated 10 March 1945, copy of which is attached marked Exhibit A. As stated by Under Secretary of War Patterson:

At the beginning of our rearmament program in 1940, industry was hesitant to accept contracts whose completion would require the use of private capital for creation of new facilities. Since we were not at

¹ The functions of the War Production Board were transferred to the Civilian Production Administration by Executive Order 9638 dated October 4, 1945.

war, and the future of the defense program hinged upon events and policies which could not be predicted with any certainty, industry could not ignore the possibility that conversions and expansions undertaken for defense purposes might not be kept in operation long enough to repay their cost, if the usual rate of amortization was employed. The hesitancy which this provoked was increased by two other factors, (1) the stringency with which the existing revenue laws treated facility costs in computing income, and (2) the prospect of greatly increased rates of taxation. Not only were these rates likely to increase, but no one could say exactly when or by how much.

In the light of these uncertainties, the hesitancy of industry was understandable. At the same time, speedy plant expansion and conversion were vital military necessities. Something had to be done to reconcile financial prudence with urgent military need. To bring this about some assurance was needed that, in computing income, special allowance would be made for the possibility that war facilities would become useless before the expiration of their normal life. In view of the probability that earnings would be high for a brief period, and then might drop, it seemed only fair to permit the cost of the facilities to be taken out of the high income during the period in which it was being earned.

In addition, there was every indication that Congress would provide a very high excess profits tax to cover the period of maximum earnings. This tax policy threatened to prevent a company accumulating enough surplus to absorb the portion of the cost of the facilities which remained unabsorbed at the cessation of war production. Even patriotism could not reasonably be expected to include a contractor to court bankruptcy by tying up a large portion of his capital, much of it borrowed, in factory expansion which might suddenly become valueless. Some means had to be devised to allow the return of the cost of their expan-

sion to the contractor while the expanded facilities were being used in war production.

On May 26, 1940, the President called upon private industry for help in rearmament and recognized that, in view of a possible curtailment of order within a year or two, private industry could not be expected to assume all the financial risks of this expansion. In a report of the Committee on Ways and Means of the House of Representatives on June 10, 1940 (Report No. 2491), made in connection with a revenue bill then under consideration, it was stated that proposals had been made to provide special amortization for national defense industries and to impose excess profits tax. The two proposals were to be considered as interdependent. A press release from the White House on July 10, 1940 announced that it had been decided to incorporate in the excess profits tax bill, which was soon to be introduced, a provision for amortization over a five-year period of national defense.

5. The passage of Section 124 of the Internal Revenue Code and its subsequent amendments then followed.

6. Many of the procedures and policies followed by the War Production Board in administering Section 124 were the necessary outgrowths of those established by the War and Navy Departments during the primary administration of the law prior to December 17, 1943.

7. As required by the statute, the Secretaries of War and Navy issued from time to time regulations governing the issuance of Necessity Certificates. First, in time, was the regulation of May 22, 1942 approved by the President and later amended with the approval of the President on February 1, 1943. A copy of the regulation, as amended, is attached and marked Exhibit B.

8. During this period the purpose of the program was to get the plants built and devoted to war work in view of the great shortage of capital equipment to meet war

needs. The guides to be followed in determining the issuance of Necessity Certificates included such factors as the type of supplies to be manufactured, the time of acquisition, whether in fact a definite shortage of capacity in plant existed, the purpose of the acquisition and related matters.

9. By the spring of 1943, as stated by the Under Secretary of War Patterson in his report:

It was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The search for maximum war production now required, not an encouragement of facility expansion, but a curbing of it. On May 12, 1943 the War Production Board publicly announced:

With the exception of certain special programs, some special machinery, and further expansion of raw materials production, the United States at last has the machine tools and the capital equipment it needs to build production to defeat the Axis. For the first time in its history, the nation now has a physical plant adequate to make the maximum use of its resources in men, skill and materials.

An examination of our production effort up to that point revealed that the nation had devoted almost as much effort to the construction of necessary facilities as it had to the actual production of arms and munitions. Thereafter, it was believed, the greater part of the plants and materials which had been used so far in making machinery and equipment ought to be devoted directly to manufacturing planes, guns, tanks, and other munitions. It was suggested, therefore, that steps be taken either to restrict certification very rigidly, or to terminate it entirely.

10. We were entering into a phase of total warfare under which materials and manpower were short and every facet of our economy was being affected. It would seem that

no investment of capital should be made and no one should be allowed to use materials unless the facilities involved were clearly "necessary in the interest of national defense". If mass certifications were granted, the resultant loss of revenue to the Treasury would be appreciable. With increased tax rates, Necessity Certificates had become more attractive as a method of financing than they were when the statute was originally enacted. The cost to the Government of certified facilities was higher through a sacrifice in tax revenues. For these reasons, among others, the entire matter was re-examined with a view to determining whether the Act should be terminated so far as giving further amortization rights to any facilities or whether any investment of private capital should be entitled to emergency amortization.

11. On June 25, 1943, the matter was submitted to the Office of War Mobilization, with a suggestion of possible alternatives. The Director of War Mobilization, after considering the matter, directed the War and Navy Departments to amend the regulations governing the issuance of necessity certificates. It was suggested that the issuance of certificates for facilities for a military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion.

12. Therefore, an amendment to the existing regulations was submitted to the President for approval. This amendment to the Regulations was approved by the President on October 5, 1943 (8 F. R. 13824). A copy is attached and marked Exhibit C. Out of fairness to the applicant who had already spent his money or who had previously filed his application, the discontinuance was not to apply retroactively.

The amendment provided that a facility "shall not be deemed necessary" unless either Secretary, in exceptional cases, has determined prior to the beginning of construction or the date of acquisition that there is a shortage of

facilities for a supply required for military or naval use and that it is to the advantage of the Government that additional facilities for such supply be privately financed. As has been indicated, the clear intention was to obtain substantial termination of the issuance of certificates. For that reason, the press release issued on the date when the President approved the regulations stated that the amendment "indicates virtual termination of the tax amortization privilege". (See NY Times, Oct. 10, 1943, Sec. 5, P. 59, Col. 1; NY Times, Dec. 19, 1943, Sec. 5, P. 10S, Col. 5.)

13. In addition to the extensive notoriety of the amendment given in the press of the country, and its publication in the Federal Register, a copy of this amendment was sent to all taxpayers, including the plaintiff United States Graphite Company, who had previously filed application for necessity certificates. Copy of this notice is attached and marked Exhibit D.

14. On December 17, 1943, the President, by Executive Order, (No. 9406, 8 F. R. 16955) transferred the function of issuing necessity certificates in all future cases from the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board. The War and Navy Departments, however, were to decide the applications then on file. The principle of predetermination and the principle of considering what was to the advantage of the Government as a financial matter were retained in the transfer. On the same date, the President approved the amended regulations governing the issuance of necessity certificates prescribed by the Chairman of the War Production Board. Copies of these regulations are attached hereto and marked Exhibit E.

15. The new regulations adopting the principles outlined in the regulations of the Secretaries of War and Navy recognized the complete tie-in between the actions taken in granting priorities or authorization to construct with

respect to facilities and the financial matters to be decided with respect to the issuance of necessity certificates. Regulation (3) (c) (v) required that an application for necessity certificate be filed concurrently with the request for priority assistance or specific authorization.

16. With respect to future certifications, the Executive Order specified that necessity certificates should not be issued unless prior to the beginning of construction or date of acquisition, the Chairman of the War Production Board determined (1) that the facilities were clearly necessary for the war effort, and (2) that it was to the advantage of the Government that the facilities be privately financed.

17. It should be noted in this connection that the granting of priorities called for different considerations and the application of different standards than those entering into the issuance of necessity certificates. The power to grant priorities was derived from an entirely separate law (The Second War Power Act) and was administered under different Executive Orders No. 9040 (7 F. R. 527); No. 9125 (7 F. R. 2719); No. 9638 (10 F. R. 12591). In point of fact, the preference ratings issued to United States Graphite Company in this case for this equipment were AA-3. There were several priorities higher than this that could have been granted.

18. There was a tremendous advantage to be gained by any private manufacturer who could build up a postwar plant at the expense of wartime income. A memorandum prepared by the Tax Amortization Branch of the War Production Board outlining the factors to be considered in predetermination, whether it was to the advantage of the Government that the facilities be privately financed, is attached and marked Exhibit F. The standards applied in the partial certification of facilities were these:

I. Postwar utility

A. Under War Production Board policy, facilities having presumptive postwar utility receive partial certification

only. This policy arises out of section 3-b-2 of Executive Order 9406 which requires a finding: "that it is to the advantage of the Government that such additional facilities be privately financed." The section was designed to protect the financial interest of all of the taxpayers in a certified facility. The Government, which represents all the taxpayers, may eventually pay as much as 85 percent of the cost of a fully certified facility, whereas if the facility were Government owned, the Government would be able, by sale or other disposition after the war, to recoup a part of its cost. Thus, the facility would have been made available for the war effort at a probable saving as compared with full certification. The saving would result no matter who is able to use the facility after the war, so that postwar utility should not be considered as limited to utility in the hands of any particular applicant.

B. Postwar utility is not restricted to usefulness to the applicant himself in his regular business, as a facility is considered to have presumptive postwar utility if it may reasonably be considered useful to anyone after the war. For example, a "standard machine tool" is always considered to have postwar utility because it can be used to produce many items other than the subject war product for which the applicant needs it. On the other hand, a "special machine tool" which can be used only to make a specific war product having no civilian use would be considered as having little or no presumptive postwar utility. Again, permanent structures, installations, and building additions are practically always to be considered as having presumptive postwar utility, while a strictly temporary structure of such construction that it could not be useful for many years might be considered to have little or no presumptive postwar utility.

II. Purpose of partial certification

Partial certification is intended to cover a liberal allowance for the excess cost of wartime acquisition or construction as compared with normal or prewar (1937-1939) costs.

III. Standard 35 per cent partial certification

A. After surveys of current and prewar costs of many types of facilities, partial certification has been standardized at 35 per cent of current costs.

B. Departure from the standard 35 per cent partial certification for facilities having presumptive postwar utility would require definite evidence that 35 per cent does not cover the increase in current costs above pre-war costs. For example, if it be established that a facility currently costing \$100,000 could have been built in the period 1937-39 for \$40,000, a recommendation of 60 per cent certification would be in order.

IV. Mixed percentage certification

There is no objection to recommending 100 per cent certification of certain facilities and denial or partial certification of certain other facilities covered by the same application, or a mixture of all three recommendations, as the facts may warrant. Such mixed percentage recommendations should clearly indicate which recommendation applies to each portion of the application, and the reasons therefor.

V. Recommendations

All recommendations should specify whether or not the facility is considered to have postwar utility. If special circumstances appear to warrant certification in excess of the standard 35 per cent, the facts should be clearly stated to support an appropriate recommendation.

19. There is attached hereto a copy of the circular dated March 8, 1944 approved by J. A. Krug, then Vice Chairman of the War Production Board, setting forth criteria for preparation of recommendations for necessity certificates. A copy is attached and marked Exhibit G.

20. Under the above established procedures, the application of the United States Graphite Company for a necessity

certificate to amortize its machinery was considered. This application was filed on May 29, 1944, with the Tax Amortization Branch of the War Production Board. This application was considered independently of the issuance of a necessity certificate for the plant. The necessity for amortization of the machinery was determined upon the facts and circumstances then existing at the time of the application. The bulk of the machinery in question consisted of standard machine tools in general use in industry such as internal grinders, drill presses, surface grinders, hydraulic grinders and related tools. It was our opinion that these items were likely to have a broad market and general value at the end of the war and be of use for normal peacetime production.

21. Applying the general principles and policies outlined in the regulations, we arrived at the determination that only 35 per cent of the cost of these items should be amortized during the emergency period. Accordingly, a necessity certificate was issued for the items acquired after the time of our determination, July 17, 1944, covering 35 per cent of the cost. Items acquired before that date were denied a necessity certificate for the reason that the application was not filed at the time required by the regulation.

22. The scope of this program is indicated by the fact that total dollar value of necessity certificates issued since the inception of the program in 1940 exceeds \$6,700,000,000. Applications and certificates covered every phase of industry, manufacture, mining and transportation. Subsequent to the transfer of this program to the Chairman of the War Production Board on December 17, 1943, a total of 11,435 applications for necessity certificates were received and passed on by the War Production Board. Of these, 2,074 were approved, 4,268 were denied in part, 3,671 were denied in total, and 1,422 were withdrawn. In approximate dollar value, the total amount covered by applications for necessity certificates during this period was \$1,498,-

730,000. Of time amount, \$70,163,000 were approved and the total amount denied was \$797,567,000.

23. Although accurate statistics are not available covering the exact percentages of such applications which were denied for various reasons, of the total amount of all certificates issued, a majority were granted for only a percentage of the amount applied for, varying in individual cases from 20 per cent to 80 per cent, dependent upon the determination of what portion of the material applied for were attributable to expenditures necessary in the interests of national defense during the emergency period. A substantial portion of the applications were denied, in whole or in part, for the reasons that application was not made in a timely manner as provided by Executive Order No. 9406 of December 17, 1943, and the regulations of the War Production Board.

24. The administration of Section 124 involved difficult and intricate problems. As put by Under Secretary of War Patterson:

Danger came from two directions. On one side, the law had to be administered so as to make it possible for the manufacturer actually to secure the protection it was designed to provide and to secure it so promptly that he would begin work at once. On the other hand, the Government had to be protected against any action under the law which might confer upon firms using it, advantages beyond those legitimate and necessary to the enlisting of their cooperation in building defense facilities. Under the special circumstances which existed between the Fall of France and Pearl Harbor, a belief that the Tax Amortization Law was being used as a means to gain undeserved profits might have reacted disastrously upon the whole defense program.

25. The whole philosophy of the program was an attempt "to map a careful course which would secure haste with-

out waste". The determination of the application of the United States Graphite Company conformed to these principles.

Attachments.

SIDNEY T. THOMAS.

Sworn and subscribed before me this 27th day of December, 1946.

MARY M. REPETTI
Notary Public, D. C.

My commission expires Dec. 1, 1949.

EXHIBIT A

Filed Dec 30 1946—C. A. 36695

WAR DEPARTMENT

OFFICE OF THE UNDER SECRETARY

WASHINGTON, D. C.

A REPORT TO THE SECRETARY OF WAR ON THE ADMINISTRATION OF SECTION 124 OF THE INTERNAL REVENUE LAW RELATING TO THE ISSUE OF NECESSITY CERTIFICATES.

INTRODUCTION

Wars are often lost before the first shot is fired.

Fortunately enough Americans realized this back in 1940. Although the national peril was great, we were not at war. We were witnessing the tragic consequences of "too little and too late." Our Army was woefully small, and we were totally lacking in facilities capable of producing the vast quantities of munitions that would be required. Immediate action was needed to avert the fate of other unprepared nations.

Congress passed laws to get the men it knew we would need for our armed forces and to get the material with which to arm them. The Selective Training and Service Act was passed in September 1940 to get the men. The Tax Amortization law was passed in October 1940 to help get the material.

Private industry was naturally reluctant to risk its funds in the creation of war facilities. The Tax Amortization law was designed by Congress to give industry protection against possible bankruptcy and to encourage it to use its capital in building war facilities. The law did this by allowing a write-off of the cost of the facilities within a period of five years.

This measure enabled us as a Nation to rely upon private industry for part of the needed expansion. It gave us the opportunity to build with speed the necessary facilities, not only to defend our shores but to attack the enemy without let-up.

The attached report shows how the law, by no means perfect as it was first written, was amended to become more efficient step by step. It shows how the problems of administering it, unexpected in their extent and complexity, were tackled and solved. It outlines a few of these problems.

The need for huge quantities of tanks, planes and guns was evident at the start. But for tanks, we needed steel; for steel, we needed coke; for coke, we needed coal; for coal we needed transportation. New facilities were needed to produce an enormous variety of items needed for the war ranging from alpha protein to fish oils, from igloos to synthetic rubber, from V-mail to yeast. The total of facilities certified by the War Department had a value of almost five billion dollars.

Certification had to be speedy, but it also had to be carefully administered so that the Government's interest

would be protected. Infinite care and careful attention to details were essential in meeting the many unprecedented situations which arose. The distinction between facilities necessary for defense purposes and those which were not, was often difficult to make. There was no doubt that a machine gun plant ought to be certified, and relatively little doubt that movie theatres and facilities for providing soft drinks, candies and pies for war workers ought not to be certified. But there were cases in between these extremes, such as facilities for housing, for banks and for servicing firms, where a correct decision as to the applicability of the law involved perplexities. Mistakes were doubtless made, but an important job was well done.

A pattern has here been written of how legislation designed to solve a technical and difficult problem can be put into action—perfected as it goes along—and, through intelligent administration, made to achieve notable success.

It is one chapter in the record of how this Nation, operating within a system of private enterprise which our enemies sneered at as stupid and inefficient, was able to arm itself with greater speed and thoroughness than any other Nation in history.

ROBERT P. PATTERSON

Under-Secretary of War.

WAR DEPARTMENT
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D. C.

February 15, 1945

A REPORT TO THE SECRETARY OF WAR ON THE
ADMINISTRATION OF SECTION 124 OF THE
INTERNAL REVENUE LAW RELATING TO THE
ISSUE OF NECESSITY CERTIFICATES.

THE NEED FOR THE AMORTIZATION LAW

At the beginning of our rearmament program in 1940, industry was hesitant to accept contracts whose completion would require the use of private capital for creation of new facilities. Since we were not at war, and the future of the defense program hinged upon events and policies which could not be predicted with any certainty, industry could not ignore the possibility that conversions and expansions undertaken for defense purposes might not be kept in operation long enough to repay their cost, if the usual rate of amortization was employed. The hesitancy which this provoked was increased by two other factors, (1) the stringency with which the existing revenue laws treated facility costs in computing income, and (2) the prospect of greatly increased rates of taxation. Not only were these rates likely to increase, but no one could say exactly when or by how much.

In the light of these uncertainties, the hesitancy of industry was understandable. At the same time, speedy plant expansion and conversion were vital military necessities. Something had to be done to reconcile financial prudence with urgent military need. To bring this about some assurance was needed that, in computing income, special allowance would be made for the possibility that war facilities would become useless before the expiration of their normal life. In view of the probability that earnings would be high for a brief period, and then might drop, it seemed only fair to permit the cost of the facilities

to be taken out of the high income during the period in which it was being earned.

In addition to the difficulties already mentioned, prospective contractors also had to take into account the existence of a tax law designed to limit profits. This was the Vinson-Trammell Act which had originally limited profits on naval and aircraft construction to 12%, but which was amended, at exactly the moment when a great facilities expansion became necessary, to limit profits to 8%. In addition, there was every indication that Congress would provide a very high excess profits tax to cover the period of maximum earnings. This tax policy threatened to prevent a company accumulating enough surplus to absorb the portion of the cost of the facilities which remained unabsorbed at the cessation of war production. Even patriotism could not reasonably be expected to induce a contractor to court bankruptcy by tying up a large portion of his capital, much of it borrowed, in factory expansion which might suddenly become valueless. Some means had to be devised to allow the return to [of?] the cost of their expansion to the contractor while the expanded facilities were being used in war production.

The Treasury took the position that, under existing law, the depreciation period could not be accelerated. It could give no assurance of a deduction for partial loss of useful value which, as soon as the emergency was over, would have allowed the writing down of the facilities to their post-war value. This inability to offer the contractor any assurance of special treatment of his war facilities for tax purposes made industry hesitate seriously about executing contracts for rearmament. The defense program was thus placed in serious jeopardy.

On May 26, 1940, the President called upon private industry for help in rearmament and recognized that, in view of a possible curtailment of orders within a year or two, private industry could not be expected to assume all

the financial risks of this expansion. In a report of the Committee on Ways and Means of the House of Representatives on June 10, 1940 (Report No. 2491) made in connection with a revenue bill then under consideration, it was stated that proposals had been made to provide special amortization for national defense industries and to impose excess profits tax. The two proposals were to be considered as interdependent. A press release from the White House on July 10, 1940 announced that it had been decided to incorporate in the excess profits tax bill, which was soon to be introduced, a provision for amortization over a five-year period for new facilities certified as necessary for the purpose of national defense. The announcement stated:

The contemplated action is expected not only to simplify the multiple tax problems of prospective contractors but to greatly clarify their future tax liabilities.

In this manner any doubts as to the tax position of contractors in the general program of national rearmament will be removed and they will be able quickly to execute defense contracts.

LEGISLATIVE HISTORY—THE BASIC LAW

World War I Law. There had been an amortization law for World War I but it was not considered a useful model. It had not been passed until three months after the Armistice; it provided for amortization on the basis of loss of useful value, an intangible factor which was to be determined by the courts. Consequent litigation had dragged on for years.

Basis for new law. In order to provide a law susceptible of exact calculation, it was decided that the new amortization provision should be based upon depreciation rather than loss of useful value. In other words, deduction of the entire cost of new defense plants was to be permitted during the period in which orders for war material con-

tinued. Because it was recognized that it was nearly impossible to determine in advance what facilities would be useful, and how far they would be useful, when war orders ceased, it was decided to permit the charging off of the entire cost, or a predetermined percentage thereof. Because it was also impossible to know in advance how long the facilities would be engaged on war work, the tentative amortization period was fixed at five years; with provision for shortening the period and accelerating amortization correspondingly, with proper readjustment of the tax, if war orders did not require the use of the facilities for the full period of five years.

In order to provide a law susceptible of speedy administration, it was concluded that decisions as to necessity should be made not by the courts but by the procuring agencies, which could be expected to know best whether a particular expansion was necessary to national defense.

Introduction of bill. Provisions for amortization were incorporated in the bill, H. R. 10413, together with provisions for imposing an excess profits tax and for suspending the profit-limiting provisions of the Vinson-Trammel Act during the period in which the excess profits tax was in effect.

The Assistant Secretary of the Treasury, in explaining the bill, stated that the existing provisions for depreciation were designed to allow the cost of facilities as deductions from income during the years in which the asset contributed to income, but he recognized the inadequacy of these existing provisions when applied to facilities for the defense program.

Following the joint hearings of the Ways and Means Committee and the Senate Finance Committee, which consumed five days, H. R. 10413 was introduced in the House on August 27, 1940 and was passed without amendment on August 29.

Conditions in granting of amortization—Subsection (1). Objection was raised in the Senate to three subsections of the amortization provisions of the bill passed by the House. These subsections, (l), (j), and (k), incorporated a policy designed to insure the continued existence of the amortized facilities for possible further use in national defense. To provide for this it was stipulated, under penalty of an increased tax liability, that the facilities for which amortization deductions were taken were not to be destroyed or substantially altered without the consent in writing of the Secretary of War or the Secretary of the Navy. If consent was refused the Government was obligated to purchase the facilities at a price not in excess of the adjusted base nor less than one dollar, with provision for repurchase by the taxpayer under certain circumstances.

The Advisory Commission to the Council of National Defense asked for the elimination of these three subsections. The Commission expressed full approval of their purpose, but believed the objective could best be accomplished through contract provisions. In this connection the Advisory Commission outlined a contracting policy which it believed would adequately protect the interest of the Government in facilities which were accorded amortization.

The Finance Committee, after concluding its hearings, reported the bill back to the Senate with amendments. The principal amendment was a substitute subsection (i) to take the place of subsections (i), (j), and (k). The new subsection (i) required, in the alternative, either "non-reimbursement" or "government protection" as a condition to amortization. The Senate passed the bill as thus modified, and in conference the substitute subsection (i) was agreed upon.

Certificates Contemplated by Act. The Act, was finally approved on October 8, 1940 (Public Law 801, 76th

Congress; Section 124 Internal Revenue Code) provided as follows:

Necessity Certificate. For facilities acquired or constructed after June 10, 1940,¹ which the Advisory Commission and either the Secretary of War or the Secretary of the Navy by the issuance of a "Necessity Certificate" certified were necessary in the interest of national defense, an annual deduction of 20% of the cost could be taken at the election of the taxpayer. Thus, these facilities could be amortized in five years.

Certificates of Non-Reimbursement and Government Protection. By the terms of subsection (i), the amortization deduction was allowed only upon condition that the contract offered no direct or indirect reimbursement in excess of normal exhaustion, wear and tear, unless the contract which afforded such reimbursement also contained terms which adequately protected the interest of the United States Government in the future use and disposition of the facility. The fact that no reimbursement had been offered in a particular contract could be established, with respect to any given contract, by a Certificate of Non-Reimbursement issued jointly by the Advisory Commission and either the War or Navy Departments. The fact that the contract adequately protected the interests of the government could be established by a Certificate of Government Protection, similarly issued.

Non-Necessity Certificate. If before the expiration of the five-year period the Secretary of War or the Secretary

¹ This date was agreed upon in conference, it being the date upon which the House Ways and Means Committee reported its intention to consider an amortization act. It was thought that a decision to build or acquire facilities after that date might be assumed to have been made with a promise of amortization. The original draft had fixed upon the date of the White House release, July 10, 1940.

of the Navy certified by issuance of a "Non-Necessity Certificate" that particular facilities had ceased to be necessary, provision was made, at the taxpayer's option, to recompute the amortization deduction so as to provide full amortization over the shortened period. A similar privilege was given, without issuance of a certificate, to all owners of certified facilities if the President proclaimed that a substantial portion of the certified facilities had ceased to be necessary. Taxes were to be recomputed in accordance with the recomputed amortization.

Payment Certificate. The Act also provided for certification by the Secretary of War or the Secretary of the Navy of the fact of payment in cases where a payment was made for unamortized costs because the contract involving the use of the facilities had been terminated by its terms or by cancellation, or in cases where a contemplated contract involving the use of the facilities was not granted. In such cases amortization was to be accelerated, at the election of the taxpayer, by permitting a larger deduction for the year of the payment.

AMENDMENTS OF THE LAW

Filing Date. As passed on October 8, 1940, the amortization law provided that Necessity Certificates should not be issued unless issued before the beginning of the construction or the date of acquisition; except that in the case of facilities already started or acquired when the law was passed, the certificate had to be issued before February 6, 1941. This time limit for the issuance of a certificate, regardless of the time of filing the application, afforded no opportunity for investigation and made the statute impossible to administer. As the February 6 deadline approached, the necessity for legislative change became obvious. The matter was laid before Congress, and on January 31, 1941, Public Law No. 3, 77th Congress (H. J. Res. 80), was passed amending the law so as to

eliminate the fixed date and provide instead that an application for a necessity certificate must be filed within 60 days of the beginning of construction or of the date of acquisition or before February 6, 1941.

Although this provided ample time for the proper consideration of cases, it was found by late spring that the continually growing demand for war material caused such frequent changes in plans for facilities that the time limit of 60 days for the filing of applications was unsatisfactory. The War and Navy Departments accordingly proposed to Congress on July 30, 1941, that the law be amended to extend to six months the period in which applications must be filed. This, it was hoped, would make it possible to gather in one application proposals which had previously appeared in two or more. The amendment, together with others described below, were passed by Congress. The President gave his approval to it as Public Law 285, 77th Congress (H. J. Res. 235), on October 30, 1941.

Joint Certification. The requirement of joint certification by two governmental authorities had all the disadvantages of divided responsibility. Administrative history in the past had often proved the unwisdom of such an arrangement; experience with the Amortization Law proved it once more. While the War and Navy Departments had agreed with the Advisory Commission of the Council of National Defense on instructions for the preparation of applications early in November of 1940, agreement on general principles for deciding cases was not achieved. Particular difficulty was encountered with respect to Certificates of Non-Reimbursement and Government Protection. Every attempt was made on both sides to be judicial, but agreement was not achieved. Since there was no machinery for appeal, deadlocks were inevitable and delays in administration became sufficiently serious to give contractors just cause for concern. A

change in the law was necessary. The Armed Services urged that they be relieved of responsibility or given sole responsibility. By the fall of 1941, the Advisory Commission had practically no active functions other than that of certifying orders under the Amortization Law. The Armed Services, being the procuring agencies, were in the best position to decide the facility needs of their procurement programs. Once convinced that joint certification was a failure, Congress had little hesitation in terminating the Advisory Commission's certifying authority. This was done on October 30, 1941. From then on, War Department cases were decided by the War Department alone and Navy cases decided by the Navy alone. In due course of time, both agencies came to lean heavily upon the able assistance of the War Production Board in matters involving civilian supply.

Non-Reimbursement and Government Protection. Because sub-section (i) of the basic law required certification that there had been no reimbursement or in the alternative that there had been government protection, every contract, even those for small amounts of standard supplies, had to be examined. In the absence of either a Certificate of Non-Reimbursement or a Certificate of Government Protection, no assurance could be given the contractor that he would be entitled to amortization under his Necessity Certificate.

Determination of whether or not the price included reimbursement for more than normal depreciation proved almost impossible of attainment.

It was also difficult to establish standards for protection of the government's interest in amortizable facilities. An attempt was made to arrive at a uniform contract provision to be inserted in all supply contracts involving additional facilities, which would adequately protect the interest of the United States in the future use of disposition of the facilities and would legally warrant the

issuance of a Certificate of Government Protection. However, the Attorney General gave his approval only to provisions which proved unworkable from a practical standpoint.

Some relief was secured by the October 30, 1941 amendment to the law (Public Law 285) whereby contracts under \$15,000 and contracts for non-defense supplies were excluded from examination for reimbursement of facility costs. But there still remained the apparently insuperable difficulty of deciding whether the unit price in the numerous larger contracts included an amount in excess of normal depreciation. The amortization law was intended to overcome the hesitancy of contractors to invest private funds in needed facilities. To do this effectively the necessary certificates had to be issued at approximately the time of contracting for the facilities. By the end of 1941 Necessity Certificates had been issued by the War Department on \$1,210,700,000 of facilities but the record on Certificates on Non-Reimbursement and on Government Protection was unsatisfactory. 3,120 applications had been made to the War Department for certificates of Non-Reimbursement; only 278 had been issued. 219 applications had been received for Certificate of Government Protection; only 30 had been issued. Delay was causing considerable doubt about the amortization allowance. Hesitancy on the part of prospective contractors continued.

This was the situation when the United States was attacked by Japan. In spite of the gathering danger, the flow of private capital into plant expansions had not been rapid. And although a vast amount of Government financing had been provided, the tremendous demands which the coming war set up made it highly desirable to afford private capital an adequate opportunity to serve.

On December 17, 1941, the War and Navy Departments proposed to Congress the repeal of subsection (i) as of the date of its passage. They took the position that the

protection of the interest of the Government could be assured by a sound contracting policy at the time the contract was agreed upon. By that time the War Department had gained a great deal of experience with the problems involved in contracting for supplies requiring new or additional facilities. In view of the grave situation created by the outbreak of war, and the urgent need for making the greatest practicable use of private financing, it seemed only reasonable to rely upon this experience, rather than rigid rules, in administering the Amortization Act.

On February 5, 1942, H. J. Res. 257 (Public Law 436) which repealed subsection (i) as of the date of its passage was approved. With its passage the major obstacle in administering the Amortization Act was removed.

Further Amendments.

Under the original act only corporations were allowed amortization deductions. Although never clearly stated, it was understood that this limitation sprang from the fact that only corporations were liable to the excess profits tax. From time to time the question was raised whether individuals or partnerships, operating as such ought not to be included. As a consequence, in the Revenue Act of 1942, the Treasury Department suggested the extension of amortization to individuals and partnerships and the law was so amended by Public Law No. 753, 79th Congress. This same Act also permitted, for the first time, amortization of facilities acquired prior to June 10, 1940, the earliest permissible date of acquisition being extended back to January 1, 1940. The War Department neither offered nor expressly favored these amendments.

ADMINISTRATION BY THE WAR DEPARTMENT

Delegation to Under Secretary. On October 15, 1940, one week after the passage of the Amortization Law, the Secretary of War delegated to the then Assistant Secre-

tary of War (later Under Secretary of War) the duty of considering and acting upon the certificates which the Act required the Secretary of War to issue.

Organization of Tax Amortization Unit. A unit was established in the Office of the Assistant Secretary of War to administer the Act and to advise the Assistant Secretary as to the action to be taken upon applications. It was not formalized until Mr. Samuel Duryee became its Chief in December, 1940. Lt. Colonel (now Brig. General) Edward S. Greenbaum took over as acting Chief in March 1941 and carried that responsibility along with his other duties until January 1942. Lt. Colonel (now Colonel) George H. Foster then became Chief and held that position until the work was completed in 1944. The entire staff including military and civilian personnel was never more than 80 persons at any one time. Although this unit with its personnel and records has been transferred to different Divisions of the War Department, it has continued since its inception to administer the law under, and has remained responsible to the Under Secretary. All policy matters were settled in consultation with him and each certificate granted or denied received his approval.

Appointment of Advisory Board. In April, 1941, the Under Secretary appointed an advisory board, composed of men prominent in civil life, to examine applications for amortization with particular reference to the issuance of Certificates of Non-Reimbursement. These men gave generously of their time and experience and greatly aided the War Department in its effort to solve these difficult problems. The Board was composed of:

James P. Baxter, 3rd, President, Williams College,
Massachusetts

Samuel S. Duryee, Attorney, New York City

W. Tudor Gardiner, Former Governor of Maine

Garrard Glenn, Professor of Law, University of Virginia

James Hall, C. P. A., New York City

F. H. Hurdman, C. P. A., New York City
 Bernard Knollenberg, Librarian, Yale University,
 Connecticut

James M. Landis, Dean, Harvard Law School
 Harold F. Linder, Retired, New York City
 William L. Marbury, Lawyer, Baltimore, Maryland
 Abbot P. Mills, Attorney, Washington, D. C.
 Dave H. Morris, Jr., Banker, New York City
 Charles H. Murchison, Attorney, Jacksonville, Florida
 George S. Olive, C. P. A., Indianapolis, Indiana
 Frederick F. Umhey, Executive Secretary, International
 Ladies Garment Workers Union, New York City.

(David Dubinsky, President of the International Ladies Garment Workers Union, was originally appointed, but at his request Mr. Umhey was appointed in his place.)

With the repeal of the non-reimbursement and government protection provisions of the law, the principal duties of the Board ceased. However, the aid of individual members was from time to time obtained in deciding the more difficult questions relating to necessity certificate applications. In the Spring of 1942, a working committee of three was formed, composed of Mr. Hall, Mr. Umhey and Professor Glenn (who was later forced to withdraw because of ill health). They made regular trips to Washington in order to advise on policies or specific cases and preside over hearings with applicants. Their work was of material assistance to the War Department.

Regulations. War Department interpretation of the law was based upon Regulations governing the issuance of Necessity Certificates, drawn up by a three-man Committee consisting of representatives of the War Department, Navy and War Production Board, and approved by the President May 22, 1942.

The regulations set no hard and fast rules except as to purely procedural matters such as timeliness of filing. The guides to be followed in determining necessity were

quite simple and can be briefly summarized as follows. The necessity of a facility was to be determined in accordance with whether the supply it produced was required in the interest of national defense. A supply might be so required if essential to the armed forces, to any foreign nation furnished supplies under an act of Congress, or, under certain circumstances, even if it had only civilian use. Shortage of capacity in the industry must ordinarily be shown in order to justify an expansion.

Shortage of Capacity. The basic reason for insisting on a showing of shortage of capacity, rather than to increase the capacity of a particular company to meet its contract requirements, was the desire to spread contracts more evenly among all portions of an industry capable of producing the required items. Although generally successful in helping to spread the work, this policy necessarily required the denial of applications in cases where other companies possessed idle facilities capable of producing the needed items. When, at a later date, war production had to be doubled and trebled, the resulting shortage in capacity compelled the reconsideration of these original denials.

Types of Supplies. In the beginning it was evident that tanks, planes, guns, and ships would be demanded in quantities far beyond the existing fabricating capacity of the country. Shortly it became apparent that additional basic steel capacity was necessary. This in turn required more coke ovens for coke, more coal for coke, more iron ore, hence more mining facilities, and more transportation facilities to move the ore, coal, coke, and steel to places of usefulness. Workmen had to be transported to and from work, or housed at places of employment. Applications for the certification of transportation facilities and war housing were presented for decision. At many plants the rapid expansion of personnel led to the inauguration of "in-plant feeding." This brought applications for cafe-

teria facilities in the plants. A few of the items which were at one time or another determined to be necessary on the particular facts of the case, picked entirely at random, may be listed to give some idea of their great variety:

alpha protein, aircraft antenna, anti-toxins, arsenicals, balloon barrage wiring, balloon cloth, blitz cans, box snook, commercial alcohol, cotton duck, cord, cuspidors, dehydrated foods, dyes, ether, felt, fire extinguishers, fish oils, glue, gun butts, gun stocks, hard chrome plating, igloos, insulation materials, jeans, jungle boots, lenses, life preservers, lime, nicotinic acid, parachutes, paulins, pliers, plywood, pigments, ponderosa pine, poplins, prisms, remote control systems, resin coated raincoats, safety belts, shearlings, slide rules, soluble coffee, steel casings, steel tubing, sulphur drugs, surgical dressings, synthetic rubber, synthetic sapphire, tallow, tin plating, tuads, V-mail, water purification machines, webbing, wire cutters, wrenches, and yeast.

Other Factors: In addition to the specific legal and administrative problems governing amortization, it was necessary to take into account broad problems of contract distribution, priorities, price control, and many other factors affecting the transfer from a peace to a war economy. In determining the need for facilities it was necessary, not only to consider contract commitments and future demands related thereto, but to place the request for certification in its proper place in the over-all picture of expansion, priorities, contract distribution, and other problems and policies. When a decision on a particular case was finally made, it represented an investigation of the industrial consequences which might spring from it. As the country approached an all-out war effort it became more and more difficult to decide where to draw the line. Although some general trends of procedure might be traced, the policy was predominantly one of judging each case on its merits.

Relation to National Defense. Certain facilities were obviously too far removed from the war to be certifiable.

New construction of an office building in a large city was denied even though there was indication that its construction would ultimately be of indirect benefit to the defense program. And even though the Office of the Petroleum Co-ordinator requested wholesale conversion of oil burners to coal burners, such conversion was not certified where the applicant's product was not necessary. Applications related to such services as engineering were denied (the product of engineering firms being denominated as intellectual rather than physical) as were those related to retail distribution.

Time of Expansion. The decision as to necessity was made as of the time of expansion or later certification. In some cases the application was not received until after the facility was no longer necessary. Certain expansions of the natural rubber fabricating industry, of tin fabrication and of toluene processing (to use South American oil) were started and thereafter proved ineffective due to the situation arising after Pearl Harbor. However, amortization was granted because the facilities had been necessary when constructed.

Items Unnecessary for Defense Purposes. On occasion, an applicant was allowed certification of a larger facility than it actually needed if there was convincing evidence that no smaller facility was available. A company purchased "the only location we could get" which was "probably a third more than our requirements." Certification was granted on evidence that the useful part of the land was necessary and none other available. But where shortage of building space resulted from the fact that the applicant was building for permanence with comparative luxury, certification of a new building was denied. For the War Department was careful not to certify facilities which were in the luxury class. Plants to produce soft drinks and pies in this country were denied, as were

bottled drink and candy trucks and vending machines. Certification was denied for electric signs, glass desk tops, fish ponds, ping pong tables, pool tables and soda fountains. A flag pole was considered certifiable. Expensive carpets were denied. (But where the applicant's business involved use of diamonds, often dropped on the floor, a carpet was certified.) Air conditioning was ordinarily denied as a luxury; certified where necessary for precision work or for other extraordinary reasons. While facilities for employees were in general allowed, the expansion of a bank to accommodate defense workers and soldiers was denied, as was a shopping unit to be built in connection with a housing project consisting of a restaurant, recreation building, doctors' and dentists' offices, movie theatre, drug store, etc. Couches were on occasion denied, yet where a shift was made from male to female labor and heat prostration was a frequent occurrence in a plant, they were obviously necessary and they were certified.

Costs: Derivation of Funds: Reconversion. The cost of a facility was in general considered a matter in the discretion of the applicant so that if the facility was appropriate and necessary, inquiry was not made as to whether it was purchased or constructed for the lowest possible price or cheapest type of construction. Nor was inquiry made of the source of the funds from which the purchase was made. A new plant was about to be constructed following condemnation of an older plant; presumably it was financed with funds received from the condemnation; the application was certified. The cost of conversion from peacetime to war use was certified, but no certificate granted for an allowance in order to reconvert to peacetime use after the war.

Acquisition of Leased Property. Many applications were received for purchase of formerly leased property. In these cases, careful inquiry was made as to whether the purchase was actually necessary or whether it was feasible

for the applicant to continue to lease; if the latter was the case, certification was refused.

Acquisition from Related Persons. Purchase of facilities from related persons were not ordinarily certified. Applications were denied involving purchase of land from the president of the applicant corporation or from his father, or from companies having substantial interlocking stock interests. However, the cost of transporting facilities from the plant of one related person to another was certified.

Second-hand Facilities. Care was also taken in screening applications for purchases of second-hand facilities. Used freight cars sold by one railroad to another were on occasion denied as were purchases of used locomotives, ships and barges. Such transfers did nothing to increase over-all transportation facilities. On the other hand, where barges were bought second-hand for \$59,000, the cost of reconditioning was \$400,000 and the barges had been idle for a year due to the completion of a bridge which rendered unnecessary their former use as ferries, the purchase price and reconditioning cost were certified. A similar rule was applied to already existing plants or buildings, although in such cases it was ordinarily easier to prove the transfer was necessary. Thus, while acquisition of an existing grain storage elevator was denied certification, the acquisition of a textile factory which was going to be junked; was certified. Purchase of a brewery to be used for dried egg production (urgently required by Lend-Lease) was certified; such conversions from normal use to war use were, indeed, common—from production of permanent waving machines to aircraft instruments, from soda fountain equipment to machine guns, from pants pressing to 20 mm. shot, from coffins to shells. With second-hand equipment such as tools, or materials, it was not ordinarily feasible to inquire as to previous use, and certification was made where the acquisition was necessary.

Inquiry, in fact, had revealed on occasion a decided increase in usefulness; an example was use by an ordnance manufacturer of steel acquired from a World's Fair building.

Defense Plant Corporation Facilities. The Defense Plant Corporation had been organized by the Reconstruction Finance Corporation to finance war facilities which were to be privately operated but government-owned (owned by the Defense Plant Corporation) and leased to the operator. In certain cases the operator desired to purchase the facility from the Defense Plant Corporation. Such acquisition would not have increased over-all productive capacity but it would have encouraged use of private capital in war industry. The conclusion was reached that, in general, acquisitions from the Defense Plant Corporation were not within the scope of the Amortization Law and applications for their certification were denied.

Motive. The applicant's motive in making the expansion was not inquired into. A tramway installed in a coal mine was certified on evidence that it increased production despite an indication that the applicant's motive was to save money in disposing of waste material. Similarly, an addition to power plant facilities apparently made to save costs was certified on evidence that the addition saved fuel. The original use of the facility, however, was considered important. In an early case, a building had been erected to produce 70% peacetime products and 30% war products. A 30% certificate was granted. Later, the owner (without additional expense) converted the remaining 70% of its plant to war work and requested 100% certification. The request was denied. In a somewhat similar case, a plant was erected to produce an unnecessary product (91 Octane gasoline) in 1940. Two years later, the applicant erected additional facilities which, when combined with the 1940 facilities would produce a necessary product (100 octane gasoline). Certification was limited to the 1942 facilities. In yet another case, the applicant

started to build a factory for production of electric sirens. Before construction was completed, the applicant was advised that electric sirens were not necessary. It accordingly completed its building to produce certain Ordnance supplies (which were necessary). The entire construction was certified.

EFFORTS TO LIMIT AMORTIZATION

By the spring of 1943 it was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The use of steel and manpower to create factories, which could not then be fully used because of a lack of materials and workers, would do injury to the war effort. The search for maximum war production now required, not an encouragement of facility expansion, but a curbing of it. On May 12, 1943 the War Production Board publicly announced:

With the exception of certain special programs, some special machinery, and further expansion of raw materials production, the United States at last has the machine tools and the capital equipment it needs to build production to defeat the Axis. For the first time in its history, the nation now has a physical plant adequate to make the maximum use of its resources in men, skill and materials.

An examination of our production effort up to that point revealed that the nation had devoted almost as much effort to the construction of necessary facilities as it had to the actual production of arms and munitions. Thereafter, it was believed, the greater part of the plants and materials which had been used so far in making machinery and equipment ought to be devoted directly to manufacturing planes, guns, tanks, and other munitions. It was suggested, therefore, that steps be taken either to restrict certification very rigidly, or to terminate it entirely.

Another factor also suggested the need for a reconsideration of the amortization problem. The broad language of the act did not limit amortization to facilities for producing supplies for direct military or naval use. An increasing number of applications came in for certification of facilities in fields not under the control of the War and Navy Departments. Facilities needed in connection with transportation, the processing of food, and the production of raw materials were all deemed necessary by the agencies charged with coordinating these activities. During the period when facilities for direct military and naval supplies constituted the bulk of the expansion program, and other facilities were of minor significance, certification of cases of the latter type had been made by the War and Navy Departments upon the recommendation of the other agencies. However, in view of the fact that the War and Navy Departments were usually not directly conversant with the needs of the particular cases, it was thought that, if these cases were going to increase, certification ought to be by some other agency better able to judge their merits.

On June 25, 1943 the matter was submitted to the Office of War Mobilization, with a suggestion of possible alternatives. The Director of War Mobilization, after considering the matter, directed the War and Navy Departments to amend the regulations governing the issuance of Necessity Certificates so as to provide that certification should be discontinued. He did suggest, however, that the issuance of certificates for facilities for a military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion. A survey among the supply services of the War Department had revealed that in some programs further expansion was required.

Therefore, an amendment to the existing regulations was submitted to the President for approval. This provided that with the exception of facilities contracted for before

the date of the amendment, no facility could be considered for certification unless the certificate was issued before the expansion started. It also provided that further certification under this restriction should be made only in cases of facilities for a supply for military or naval uses, and then only after consideration of the relative advantage of governmental financing as against private financing with amortization. Simultaneously, the technical services of the War Department were advised that, where additional facilities were required and were not available from Government-owned facilities, and the private companies which could provide them were unwilling to finance them without amortization, arrangements should be made for Government financing. A few cases, it was recognized, might still arise which ought to be handled by amortization, but they would be limited to exceptional situations.

The amendment was approved by the President on October 5, 1943. Subsequently, notwithstanding the amendment, the War Department was strongly urged to issue certificates for facilities for purposes not directly military but nevertheless claimed to be essential to national defense. The Office of Defense Transportation, in particular, had urged that transportation facilities be expanded to relieve the tight situation created by increasingly heavy shipments to the West Coast. On November 1, 1943, the War Department called this situation to the attention of the Office of War Mobilization with the suggestion that if certification was to be made in such cases, it should be done by the War Production Board. Thus, the question of amortization could be settled by the same agency which authorized the use of materials for the contemplated expansion. On December 17, 1943, the President, by Executive Order, transferred the function of issuing Necessity Certificates in all future cases from the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board. The War and Navy Departments, however, were to decide the applications then on file.

Non-Necessity and Payment Certificates. By Executive Order No. 9486 of September 30, 1944, the power and the responsibility of the War Department in the issuance of Non-Necessity Certificates was transferred to the Chairman of the War Production Board, to be exercised by him in connection with his responsibility for guiding reconversion from war to peace-time production. By Executive Order No. 9490 of October 20, 1944, all the remaining functions of the War Department in connection with certification under Section 124 were likewise transferred to the Chairman of the War Production Board. This latter order covered amendments of Necessity Certificates already issued and Payment Certificates under subsection (h). Since the War Department had never issued a Non-Necessity Certificate under subsection (d), and had issued only three Payment Certificates under subsection (h), Executive Order No. 9490 in effect transferred a function which had never been exercised.

STATISTICAL SUMMARY

In the period between the passage of the Tax Amortization Act and the transfer of the certification authority to the War Production Board, 31,047 applications for Necessity Certificates were filed for consideration by the War Department. From among that number the War Department issued 26,775 certificates covering the whole or part of the application. The remaining 4,272 cases were denied, withdrawn, or otherwise disposed of. The total dollar value of the facilities certified, on the basis of their estimated worth on the date of application, was \$4,955,813,760.16.

A break-down of the figures is provided in the table which follows. It should be noted that the total in this table is three hundred million less than that cited above. The difference arises from the fact that the table is taken from the statistics compiled, first by the Advisory Commission, and later by the statistical sections of the War Production

Board after the Advisory Commission ceased to be a joint certifying authority in October 1941. In this compilation, after April 1943, all facilities of less than \$25,000 in value in any one plant were excluded. The War Department figures includes them.

<i>Type of Product</i>	<i>Estimated Cost</i>	<i>Percentage</i>
Manufacturing		
Aircraft, Engines, Parts & Access.	\$365,731,000	7.93
Ship, Construction & Repair	12,234,000	0.27
Combat & Other Motorized Vehicles	100,547,000	2.18
Guns	95,846,000	2.08
Ammunition, Shells & Bombs	135,372,000	2.93
Explosives & Ammunition Loading	13,025,000	0.28
Iron & Steel		
Basic	270,062,000	5.85
Fabricated	82,009,000	1.78
Nonferrous Metals & Their Products		
Aluminum & Magnesium	306,462,000	6.64
Other	56,265,000	1.22
Mach. Tools & Other Metal Work, Equip.	158,603,000	3.44
Machinery and Elec. Equip. & Appl.	213,273,000	4.62
Chemicals		
Synthetic Rubber	40,440,000	0.88
Other	288,405,000	6.25
Coal and Petroleum Products		
Aviation Gasoline	437,727,000	9.49
Other	100,863,000	2.19
Food Processing	35,373,000	0.77
Miscellaneous	319,777,000	6.93
TOTAL MANUFACTURING	\$3,032,014,000	
Mining and Industrial Service		
Mining	82,318,000	1.78
Gas, Light, Heat and Power		
Electric Power Generation	123,837,000	2.68
Electric Power Transmission	109,032,000	2.36
Gas Manufacture and Transmission	48,499,000	1.05
Steam, Heat and Power	6,404,000	0.14
TOTAL MINING	\$370,090,000	
Transportation and Related Service		
Rail	1,066,868,000	23.13
Pipe-line	17,654,000	0.38
Motor, Air and Water	84,489,000	1.83
Terminal Facilities	2,371,000	0.05
TOTAL TRANSPORTATION	\$1,171,382,000	
Communication	6,419,000	0.14
Non-Industrial Service	32,931,000	0.71
GRAND TOTAL	\$4,612,836,000	

After the transfer of the certification authority to the War Production Board, the War Department's action upon new applications was limited to making recommendations at the request of the War Production Board when it was claimed that the facilities were necessary for military supply. The fact that relatively few cases came up in which the need for additional privately financed facilities for military supply was established confirmed the War Department in its belief that the need for amortization as an inducement to the private financing of such facilities had come practically to an end. The War Department disposed of its backlog of about five thousand applications filed prior to the transfer of the certification authority by July 19, 1944.

CONCLUSION

The history of the Tax Amortization Law, and of its administration by the War Department, are topics full of technical and difficult detail. Yet, behind these complexities, lay the stark necessities of national defense in one of the greatest emergencies of our history. We either had to build an unparalleled munitions industry within the space of a few months or face disaster. We had to do so within the framework of the system of private enterprise, not only because that was the system in which we believed, but also because it was the system we had, and any attempt to change it suddenly would have brought dangerous confusion and delay.

This could not be achieved, however, merely by broad declarations of principle. Appeals to patriotism alone could not relieve the individual manufacturer of the necessity for remaining solvent. He could be asked to undertake the rapid expansion which national defense required for an activity of uncertain duration, only if he were given reasonable protection against bankruptcy at the end of the effort. The Tax Amortization Law was designed to provide that protection.

But the mere passage of the law did not remove the difficulty. Under any circumstances difficult problems of administering it would have arisen, problems which, unless solved, could largely destroy its intended effect. Danger came from two directions. On one side, the law had to be administered so as to make it possible for the manufacturer actually to secure the protection it was designed to provide and to secure it so promptly that he would begin work at once. On the other hand, the Government had to be protected against any action under the law which might confer upon firms using it advantages beyond those legitimate and necessary to the enlisting of the cooperation in building defense facilities. Under the special circumstances which existed between the fall of France and Pearl Harbor, a belief that the Tax Amortization Law was being used as a means to gain undeserved profits might have reacted disastrously upon the whole defense program.

The problem of the administration of the law was, therefore, an unusually thorny one. It was necessary to map a careful course which would secure haste without waste. Little help could be gained from precedent of past experience. Many difficulties were encountered. Not all of them were solved satisfactorily; perhaps some of them never could have been. Nevertheless, we got the plants, which in turn produced the guns, tanks, and planes. It is a reasonable conclusion that, without the Tax Amortization Law the construction of our munitions industry would have been seriously retarded. Had that occurred, our position today might have been very different from what it is.

ROBERT P. PATTERSON

Under Secretary of War

Filed Dec 30 1946

EXHIBIT F

Filed Dec 30 1946

WAR PRODUCTION BOARD
WASHINGTON, D. C.

February 9, 1944

MEMORANDUM

To:

The Industry Divisions, War Production Board
Facilities and Inspection Branch, Production Division,
War Department
The Bureaus of the Navy Department
U. S. Maritime Commission
The Office of War Utilities
The Office of Defense Transportation
The Petroleum Administrator for War
War Foods Administration
Office of the Rubber Director

From:

The Facilities Bureau
Deputy Director for Tax Amortization

Attached is a statement designed to be of aid in the preparation of recommendations. It is not intended to be all inclusive. Additional information may, from time to time, be requested by members of the staff of the Tax Amortization Branch.

CARMAN G. BLOUGH
Carman G. Blough
*Deputy Director for Tax
Amortization Facilities
Bureau*

PREPARATION OF RECOMMENDATIONS FOR TAX AMORTIZATION

The Government's substantial monetary interest in facilities covered by a Necessity Certificate must be recognized. Amortization represents an abnormal tax deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

No facility will be certified unless the war effort would actually be weakened by the lack thereof. This bears upon the degree of essentiality. The facility cannot be merely desirable, helpful or appropriate. It must be essential and must be required exclusively for production of one or more of the supplies enumerated in Section (3) (a) of the WPB Regulations governing the issuance of Necessity Certificates. An overall shortage of facilities in the industry or a situation covered by Section (3) (b) (ii) of the Regulations must be found to exist.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, ~~provided~~ the DPC or other government agency is willing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.

Reports must contain the findings required by Section (3) (b) of the Regulations, the most fundamental of which is the finding of an overall shortage of facilities required for the production of supplies necessary in the interest of national defense. Replacements, acquisitions from an affiliate, etc., must be commented on.

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed and must state the reasons. A favorable recommendation must contain a statement that, recognizing the Government's financial interest in a certified facility, the facilities listed in Appendix A are so essential to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

EXHIBIT G

Form GA-141
(7-20-43)

CIRCULAR SERIES SUPPLEMENT NO. 1 TO GENERAL PROGRAM
CIRCULAR

No. 33

Date: March 8, 1944

United States of America

War Production Board

Page 1 of 3

To: All Bureau and Division Directors

Approved: J. A. Krug Program Vice Chairman

Issued through: L. M. Shea Esq. Office of Procedures

SUBJECT: CRITERIA FOR PREPARATION OF RECOMMENDATIONS
FOR NECESSITY CERTIFICATES ON FORM GA-1231

Section 1 Purpose:

.01 The purpose of this supplement is to prescribe revised requirements for reports on applications for Neces-

sity Certificates which are hereafter to be incorporated as part of Form GA-1231. These requirements are supplementary to the statement that was attached to memorandum to the Industry Divisions, War Production Board, and other interested Agencies from the Facilities Bureau Deputy Director for Tax Amortization; dated February 9, 1944, and are intended to clarify and expand it, but not to change it in any way. (See Page 3.)

.02 The new data is designed to furnish the information needed to make a decision on an application for a Necessity Certificate in most cases, but additional information may, from time to time, appear to the sponsor to be pertinent or be requested by members of the staff of the Tax Amortization Branch.

Section 2, Information to be furnished by Sponsoring Agency or Division on Form GA-1231:

.01 The following information must be supplied before applications for Necessity Certificates will be approved. Sponsoring agencies or industry divisions will be held responsible for the presentation of such data.

1. Is the end product of vital importance to the war effort? If the answer is "Yes", state the basis for such a conclusion.
2. Is there an overall shortage of facilities to produce as against requirements for this product? If so, explain.
3. If there is no overall shortage of facilities, is there an area shortage? If so, state why it is imperative that the applicant increase production facilities rather than have the deficiency made up by another source.
4. Is acquisition or construction by the applicant of each facility listed clearly necessary for production of the end product? Specify all facilities not clearly necessary.

5. Are these facilities wholly or partly a replacement?
 If so, explain and state what part.

6. Are these facilities to be acquired from an affiliate?

7. Would the Government be in a good bargaining position after the War if these facilities should be publicly financed? If not, state why.

8. Are they of a type that are likely to have a reasonable postwar value? If not, state why.

9. Is it reasonable to assume that the facilities are of such a type that they may be useful to the applicant after the war? If not, state why.

10. Comments:

11. Recommendations:

A. Based upon the foregoing it is recommended that the application be denied.

Signed

(over)

General Program Circular No. 33, Supp. No. 1.

Page 2 of 2

B. Based on the foregoing it is our opinion that it is to the advantage of the Government that the facilities be privately financed. In addition, recognizing the Government's financial interest in a certified facility, we are of the opinion that the facilities listed in Appendix A are so essential to the progress of the War that the issuance of a certificate up to % of cost is recommended.

Signed

Section 3 Effective Date for Required Information:

.01 The revised requirements for reports on applications for Necessity Certificates given in Section 2 are to be incorporated as a part of Form GA-1231. Whether the new forms are available or not, all reports from Sponsoring Agencies or Divisions, dated after March 10, 1944, must contain this information or they will be returned without action.

Section 4 Instruction for determining Recommendation on Form GA-1231:

.01 By applying the answers to the questions given in Section 2 and eventually to be included on Form GA-1231, one of the following recommendations should be made:

1. That no certificate should be issued.
2. That the facilities should be partially certified (state specific percentage recommended).
3. That facilities should be certified 100%.

.02 In the event that amortization should be allowed, determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.
2. Partial certificate representing excess construction or acquisition costs over pre-war costs¹ will be given

¹ It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, pre-war costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937-1939 inclusive.

when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

3. Partial certificate will be given in appropriate percentages under certain other circumstances of an extraordinary nature. The following are examples:

a. When part of the facilities are appropriate for government financing and part for a 100% certificate, a percentage certificate may be issued for the entire project at a percentage which will result in same amount of tax amortization that would have been allowed had the individual items been considered separately.

b. When a facility is a replacement, but a more expensive facility is required because of special war needs than would be required for normal operations of the Company, a percentage certificate may be issued covering the excess of the cost of the facility over the cost of the type of facility that would have been otherwise required.

c. When the facility is clearly necessary to the war effort, but its capacity or cost is in excess of that which is necessary for the war effort, the percentage should be determined in such a way as to make no amortization allowance applicable to the excess capacity or cost.

General Program Circular No. 33, Supp. No. 1

Page 3 of 3

Attachment to Memorandum, February 9, 1944

PREPARATION OF RECOMMENDATIONS FOR TAX
AMORTIZATION

The Government's substantial monetary interest in facilities covered by a Necessity Certificate must be recognized. Amortization represents an abnormal tax deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

No facility will be certified unless the war effort would actually be weakened by the lack thereof. This bears upon the degree of essentiality. The facility cannot be merely desirable, helpful or appropriate. It must be essential and must be required exclusively for production of one or more of the supplies enumerated in Section (3) (a) of the WPB Regulations governing the issuance of Necessity Certificates. An overall shortage of facilities in the industry or a situation covered by Section (3) (b) (ii) of the Regulations must be found to exist.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market value may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government

agency is willing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a certificate were issued, such percentage being based, for example, on excess cost attributable to the war.

Reports must contain the findings required by Section (3) (b) of the Regulations, the most fundamental of which is the finding of an overall shortage of facilities required for the production of supplies necessary in the interest of national defense. Replacements, acquisitions from an affiliate, etc., must be commented on.

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed and must state the reasons. A favorable recommendation must contain a statement that, recognizing the Government's financial interest in a certified facility, the facilities listed in Appendix A are so essential to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

Inquiries should be directed to the Tax Amortization Branch, Facilities Bureau.

* * * * *

04
Office - Supreme Court, U.S.

FILED

APR 25 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, *Petitioner,*

v.

THE OHIO POWER COMPANY

**MOTION FOR CONSIDERATION BY THE
FULL COURT AND PETITION FOR REHEARING**

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**MOTION FOR CONSIDERATION BY THE
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On April 1, 1957, an order issued in this case granting the Government's petition for rehearing, vacating the prior order denying certiorari, granting the petition for certiorari and summarily reversing the judgment below. This was announced in a *per curiam* opinion concurred in by only four members of this Court.

In entering this judgment—and entirely apart from the issue of finality as to which three Justices dissented—the Court took three unprecedented actions. First, it granted a petition for rehearing by concur-

rence of only a minority of the Court without regard for the plain provisions of Rule 58(1); second, again by a minority, it reversed the judgment below on the merits without the participation of two eligible and qualified members of the Court in spite of uniform precedent and practice to the contrary; finally—and possibly inadvertently—the same minority reversed the judgment of the Court of Claims without leaving open for that court's further consideration important questions never reached or passed upon by that or any other court, again contrary to established precedent and practice. The Ohio Power Company earnestly and respectfully suggests that proper judicial procedure requires that the judgment of April 1 be reconsidered, and moves that the matter be examined by the full Court.

REASONS FOR GRANTING RESPONDENT'S MOTION AND PETITION

1. Rule 58(1) of the Revised Rules of this Court provides, in pertinent part:

“A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.”

On December 5, 1955, the Government's first and only timely petition for rehearing was considered by the full Court and denied. Almost 16 months later, on April 1, 1957, that petition for rehearing was granted, but by only four members of the Court. This granting of a petition for rehearing with a concurrence of only a minority of the Court is contrary to Rule 58(1), and is a departure from the practices of the Court which have uniformly prevailed prior to this action.

Since 1933, when both the denial and the granting of petitions for rehearing were first recorded in the published records of this Court, some 125 petitions for rehearing have been granted. We believe we have examined them all, and that we can therefore say that during that period, and up to the order in this case, no petition for rehearing has been granted contrary to the mandate of Rule 58(1)—i.e., by less than a majority of the Court. Although a Justice who was not a member of the Court at the time of the original decision is usually noted as not participating in the order granting rehearing,¹ we have found no case in which such an order was concurred in by less than a majority of the Court, as specifically required by Rule 58(1).

This is not, we submit, an accidental circumstance. Rule 58(1), in requiring a majority of the Court, rests on the obvious proposition that no rehearing should be granted unless there is at least a majority who are willing to re-examine the decision which has been reached. To state the obvious example, rehearing of a decision reached by a vote of 8 to 1 would serve

¹ E.g., *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 323 U.S. 690, 326 U.S. 801; *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp.*, 349 U.S. 901, 349 U.S. 926; *United States v. Nunnally Investment Co.*, 313 U.S. 584, 314 U.S. 705; *R. Simpson & Co., Inc. v. Commissioner of Internal Revenue*, 317 U.S. 677, 319 U.S. 778; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 348 U.S. 880, 349 U.S. 70; *Indian Towing Co., Inc. v. United States*, 349 U.S. 902, 349 U.S. 926. In addition, of course there are a number of instances in which a Justice who was a member of the Court throughout the relevant period did not participate in either the original decision, the order granting rehearing, or the subsequent decision on the merits, presumably because he considered himself disqualified by interest, prior participation, or other valid consideration.

no useful purpose if only one of the 8 were to favor it, since even were that one Justice to be persuaded by reargument to change his vote, the prior decision would not be changed.

The basis for the rule requiring a majority of the Court is no less valid when there has been a change in the membership of the Court. We show below that the rehearing itself, when once granted, has always been before the full Court as then constituted (see pp. 6-8, *infra*). Consequently, there is the same need for assurance that Justices constituting a majority of *that* Court—the Court who will make the decision on the merits after rehearing has been granted—are willing to re-examine the Court's prior order. There is therefore no basis for an interpretation of Rule 58(1) which would make "majority of the Court" mean only a majority of those members of the Court as presently constituted who happen to have participated in the prior action. Such a majority can be, and is in this instance, only a minority of the Court at the time of reconsideration. Granting a petition for rehearing with the concurrence of only a minority of the members of the Court as then constituted gives none of the assurance, which Rule 58(1) is designed to give, that the rehearing will not be futile.

We earnestly submit, therefore, that even were this an ordinary case, Rule 58(1) should be adhered to, and the action of the minority of the Court in granting the petition for rehearing should be vacated.

This is anything, however, but an ordinary matter, and apart from the plain requirements of Rule 58(1) and of sound judicial administration, there are cogent reasons for submitting this particular petition for

rehearing to the whole Court. The question of finality under the provisions of the Judicial Code and this Court's Rules is plainly one of great importance to the sound administration of justice. This Court's order of April 1, 1957, concurred in by only a minority of the Court, will have a profound and unfortunate effect on both litigants and practitioners before this Court. A successful litigant may remain subject to harassment by a tenacious opponent for years; even the most responsible counsel for a losing litigant, on the other hand, will have the greatest difficulty in honestly advising his client not to try one more petition or motion to reopen or continue his lost cause. No such precedent should be permitted to stand without at least the concurrence of a majority of the Court.²

Moreover, it is significant that the decision of this procedural issue turns, not upon matters before the Court at the time of the original decision, but entirely upon new issues not then presented. The question is not one which has anything whatever to do with the merits of the particular controversy, but has to do solely with the interpretation of the finality provisions of the Judicial Code and of this Court's rehearing rule. It was not, and by its nature could not have been, presented to the Court at the time the Government's original petition for certiorari was considered in the autumn of 1955. In its present posture the question was first presented by this Court's

² Our arguments on this important procedural question are set out in detail in briefs heretofore filed in this proceeding and will not be repeated here. See "Brief in Opposition to Motion of the United States to File a Petition for Rehearing," filed May 16, 1956; "Motion to Vacate Order of June 11, 1956, and to Dismiss Petition for Rehearing filed November 10, 1955," filed October 12, 1956.

order entered *sua sponte* on June 11, 1956, continuing the Government's petition for rehearing of denial of certiorari on the docket, and was first decided by this Court's order of April 1, 1957, reconsideration of which by the full Court is now sought. Clearly, under these circumstances, the rationale of any practice pursuant to which individual Justices not participating in the original decision do not participate in a petition for rehearing would have no application.

2. Upsetting and startling as the Court's action is in granting the Government's petition for rehearing under these circumstances, its further action in reversing the judgment of the Court of Claims by vote of only a minority of the Court represents an even more undesirable innovation in practice. The reversal of the judgment of the Court of Claims obviously constitutes a vote by the Court on the merits of the case. Thus, the case has been decided, but not by a majority of the Court. A minority of four, with two qualified Justices not participating, issued a final order in which a majority of the Court did not concur.

This is a departure from a settled custom of the Court which we believe has never heretofore been ignored. At least since 1933, in the approximately 125 petitions for rehearing which have been granted during that time by this Court, reconsideration of the merits has always been had before the full Court, including any Justices not otherwise disqualified who had become members of the Court since the initial decision.³ There

³ For example, in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 327 U.S. 661, Mr. Justice Burton participated in and dissented from a decision handed down after rehearing although he had not been a member of the Court at the time the case was originally heard, 325 U.S. 711, and had not participated in consideration

is simply no precedent for the proposition that a Justice who was not a member of the Court at the time of the prior consideration should not, or does not, sit on the subsequent consideration of the case after petition for rehearing has been granted. Indeed, the instant case is *a fortiori*; the prior action by the Court which was reconsidered—the denial of certiorari—did not involve the merits. That issue had not had prior consideration by *any* members of the Court.

This settled practice was ignored when the Government urged, and a minority of the full Court decided, that this case be summarily disposed of on the authority of two recent decisions of this Court, *United States v. Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co. v. Commissioner*, 352 U.S. 313. Respondent has urged and continues to urge that even though the certifying agency had statutory authority to promulgate its excess war cost regulation of October 5, 1943, as this Court has now held in *Allen-Bradley* and *National Lead*, this regulation was inapplicable to Ohio Power Company's facility. This is a substantial question

of the order granting rehearing, 326 U.S. 801. Similarly, in *R. Simpson & Co., Inc. v. Commissioner*, certiorari was denied before Mr. Justice Rutledge had become a member of the Court, 317 U.S. 677; although he did not take part in the consideration of the order granting rehearing, 319 U.S. 778, he participated in consideration of the merits of the case on rehearing and joined in the dissent, 321 U.S. 804. The same practice was followed by Mr. Justice Harlan in *Indian Towing Co., Inc. v. U. S.*, 349 U.S. 926, 350 U.S. 61; and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 349 U.S. 926, 350 U.S. 124. Cf. also, *Kellogg Company v. National Biscuit Co.*, 305 U.S. 111, in which both Mr. Justice Stone and Mr. Justice Roberts participated in consideration of the merits of the case on rehearing although neither had participated in the denial of the original petition for certiorari, 302 U.S. 733, or in the decision granting certiorari on rehearing, 304 U.S. 586.

which, under the unbroken practice of this Court, should not be determined on the merits by less than all of the eligible members of the Court as then constituted. Respondent has never been heard on this question, either on full briefs or on oral argument, by any court; the issues obviously should not now be summarily disposed of by a minority of the Court. An opportunity to be heard and considered by the full bench seems clearly appropriate. At the very least, all eligible members of the Court should consider the limited question, discussed below, of whether the judgment of this Court may properly stand without being amended to leave this issue open on remand of the cause to the Court of Claims.

3. Finally, Respondent respectfully urges that the judgment of this Court of April 1, 1957, should at least be amended to remand the cause to the Court of Claims for further proceedings not inconsistent with the decisions of this Court in the *Allen-Bradley* and *National Lead* cases. Compare *D. H. Mitchell v. United States*, 348 U.S. 905, and *Union Trust Co., et al. v. Eastern Air Lines, Inc.*, 350 U.S. 962.

The original decision of the Court of Claims⁴ rested entirely on the earlier decision of that court in *Wickes Corporation v. United States*, 123 Ct. Cls. 741, 108 F. Supp. 616 (1952), which in turn was based solely on a holding that the War Production Board was without statutory authority to promulgate its excess war cost regulations. There is no doubt that that ground of decision has now been destroyed by this Court's decisions in *Allen-Bradley* and *National Lead*.

⁴ Reproduced in Appendix B, p. 19 of the Government's "Petition for a Writ of Certiorari" filed in this case on August 11, 1955.

The significant fact, however, is that apart from statutory authority there remain important and complex questions of applicability to Ohio Power Company's facility of the regulations of the War and Navy Departments, as was required by Executive Order 9406—questions which were never reached or considered by the Court of Claims because its ground of decision made their consideration unnecessary. Accordingly, in all fairness those questions should be left open on remand of this case to that Court. Under circumstances such as this the Court has recognized that an error by a lower court on one issue should not prejudice the parties on other issues, and has reversed or vacated the judgment below and remanded the case for further proceedings consistent with this Court's opinion. *Cahill v. New York, N. H. & H. R. Co.*, 351 U.S. 183; *Union Trust Co., et al. v. Eastern Air Lines, Inc.*, 350 U.S. 962; *Boudoin v. Lykes Bros. S.S. Co., Inc.*, 350 U.S. 811; *Calmar S.S. Corp. v. Scott*, 345 U.S. 427; *Dean Milk Co. v. Madison*, 340 U.S. 349; *United States v. Interstate Commerce Commission*, 337 U.S. 426; *N.L.R.B. v. Pittsburgh S.S. Co.*, 337 U.S. 656; *Maggio v. Zeitz*, 333 U.S. 56. Indeed, in the *Eastern Air Lines* case this action was taken on a petition for rehearing following a judgment of simple reversal, as here, and in both the *Boudoin* and *Cahill* cases the obvious necessity that all questions be resolved by the courts led this Court to make even out-of-time changes in its mandate so that questions presented to the lower courts but not reached by those courts were left open on remand by the amended judgments.

The nature of these issues relating to the applicability of the regulations—the issues which were not decided by the Court of Claims—has been stated in some

detail in earlier papers filed in this case.⁵ Some brief additional comments, however, seem warranted. The *per curiam* opinion of April 1, 1957, emphasizes the importance of "uniformity in the application of the principles announced" in the *Allen-Bradley* and *National Lead* cases. The judgment as entered, however, violates rather than furthers this principle. Ohio Power has *not* been accorded treatment under Section 124 of the Internal Revenue Code of 1939 uniform with that which has been given all other taxpayers who began construction or made acquisition of emergency facilities between January 1, 1940, and October 5, 1943.

As pointed out in our earlier briefs referred to above, Ohio Power began its construction of the Tidd project emergency facility in August 1943. Between January 1, 1940 and October 5, 1943, when the Secretaries of War and Navy were the certifying authorities under Section 124, thousands of taxpayers started construction of emergency facilities or applied for necessity certificates, and an excess-war-cost limitation was *never* imposed.⁶ All of these thousands of taxpayers, except Ohio Power, have been permitted to amortize 100 percent of the cost of the certified facilities,⁷ which can be established beyond any doubt upon a

⁵ "Motion to Vacate Order of June 11, 1956, and to Dismiss Petition for Rehearing Filed November 10, 1955," pp. 20-44, filed October 12, 1956; "Brief of Respondent in Opposition to Petition for Rehearing," pp. 4-15, filed February 12, 1957.

⁶ It can be proved on remand that on the few occasions where a partial certificate was issued by the Secretaries the entire facility was not necessary in the interest of National defense. The certificate issued to Ohio Power was not such a certificate as the entire plant was determined to be necessary.

⁷ In both *Allen-Bradley* and *National Lead* all construction work or acquisitions and the filing of applications with respect thereto took place after October 5, 1943.

remand to the Court of Claims. These 100 percent certificates were issued by the Secretaries of War and Navy in accordance with their regulations as adopted and approved by the President. On October 5, 1943, the regulations of the Secretaries of War and Navy were amended⁸ to provide for the first time that if an emergency facility had presumptive post-war use, with respect to construction commenced after that date only the excess war cost over normal cost of constructing the facility would be amortizable under Section 124, but with respect to construction commenced prior to October 5, 1943, the so-called "excess war cost" limitation was not to be applied. Subsequently, when the certifying authority was transferred from the Secretaries of War and Navy to the War Production Board, the Executive Order of transfer (E.O. 9406 dated December 17, 1943)⁹ specifically provided:

"3. (a) The regulations of the Secretary of War and the Secretary of the Navy in effect prior to October 5, 1943 shall govern the issuance of Necessity Certificates for all applications for Necessity Certificates describing facilities the beginning of the construction, reconstruction, erection, installation or the date of acquisition of which was prior to October 5, 1943."

This Executive Order established beyond any doubt that a new rule was adopted on October 5, 1943, because if a change had not taken place there would have been no necessity for providing in the order that construction started and acquisitions made before October 5, 1943, should be controlled by the regulations of the

⁸ "Appendix to Brief of Respondent in Opposition to Petition for Rehearing," p. 11, filed February 12, 1957.

⁹ Id. at p. 2.

Secretaries of War and Navy rather than the regulations of the War Production Board. It is clear and beyond dispute that taxpayers who had commenced construction of emergency facilities prior to October 5, 1943, as had the Ohio Power Company, were to be accorded different treatment from those, like *Allen-Bradley* and *National Lead*, who had commenced construction or made acquisitions after that date.

Accordingly, applicable principles of uniformity and "the interests of justice" referred to in the *per curiam* opinion require at least that respondent be given the opportunity it has not previously had in any court to present the merits of this substantial question. In the cases of *Allen-Bradley*, *National Lead* and *Wickes*, *supra*, all of whom began their construction or made their acquisitions of emergency facilities after October 5, 1943, the Government introduced the affidavit of Sidney T. Thomas, Chief of the Amortization Section of the War Production Board, which stated that the new regulation of October 5, 1943 was not made retroactive "out of fairness to the applicant who had already spent his money . . ."¹⁰ In these three cases only the regulations, practices and policies of the War Production Board were involved. Respondent's case involves the regulations, practices and policies of the War and Navy Departments, which, under Executive Order 9406 above, should have been applied to respondent's certificate. In view of the record in *Allen-Bradley* and *National Lead*, and especially the sworn statement of Thomas that the new regulation was not to be applied retroactively, respondent should be per-

¹⁰ Id. at p. 16.

mitted to show that its certificate was mistakenly issued under WPB regulations instead of under the regulations of the War and Navy Departments, and that the WPB acted in violation of the Executive Order.

The substance of the Thomas statement above was given wide publicity on October 5, 1943.¹¹ Relying on the published statements that the new regulation would not be applied retroactively and on the War and Navy Departments' regulations and the Executive Order, the respondent spent millions of dollars on the construction of the Tidd project before the WPB issued its certificate on November 9, 1944 limiting its amortization deduction to excess war cost in violation of Executive Order 9406. With construction so far advanced, and in view of its contractual commitments for the project, respondent had no real choice, as did *Allen-Bradley* and *National Lead*, on whether or not to proceed with the construction. Withdrawal was not possible.

We submit that under these circumstances justice and fairness require that respondent at least be accorded an opportunity to prove on remand to the Court of Claims that under the regulations of the Secretaries of War and Navy, as they existed prior to October 5, 1943 and the practice and policy pursued thereunder, it was entitled to amortize the full cost of the Tidd plant; that the entire facility was determined to be necessary; and that the sole reason for the limitation on the amortizable cost was the new excess war cost limitation adopted for the first time as a result of the

¹¹ Id. at p. 17.

amended regulation of October 5, 1943, which was mistakenly applied here in violation of Executive Order 9406.

CONCLUSION

Respondent respectfully urges that this Court's judgment of April 1, 1957, be reconsidered by all of the present members of the Court, including Mr. Justice Brennan and Mr. Justice Whittaker, and upon such reconsideration:

(1) that the Government's petition for rehearing of denial of certiorari be dismissed or denied as inconsistent with the principles of finality established by the Judicial Code and this Court's Rules;

(2) alternatively, that if that portion of the judgment of April 1, 1957, granting rehearing of the denial of certiorari and granting a writ of certiorari remains unchanged, the question presented on the merits as to the effect on Ohio Power of the decisions in *Allen-Bradley* and *National Lead* should be considered by the full Court, and, before decision is reached, should be set down for oral argument, and

(3) as a further alternative, if the Court deems it inappropriate to hear oral argument on the effect on this case of the *Allen-Bradley* and *National Lead* decisions, that in any event its judgment of April 1, 1957, summarily reversing the Court of Claims, should be amended to provide for remand of the cause to the Court of Claims for further proceedings not incon-

sistent with the opinions of this Court in *Allen-Bradley*
and *National Lead*.

Respectfully submitted,

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Of Counsel

I certify that both this Petition for Rehearing and Motion for Consideration by the Full Court are presented in good faith and not for delay and that the Petition for Rehearing is restricted to the grounds specified in Rule 58.

J. MARVIN HAYNES

Counsel for Respondent

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FILED

APR 25 1957

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

—
No. 312
—

UNITED STATES OF AMERICA, *Petitioner*,

v.

THE OHIO POWER COMPANY

—
**PETITION TO MR. JUSTICE BRENNAN
AND MR. JUSTICE WHITTAKER**
—

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UNITED STATES OF AMERICA, *Petitioner,*

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**PETITION TO MR. JUSTICE BRENNAN
AND MR. JUSTICE WHITTAKER**

On April 1, 1957, the Court, by a *per curiam* opinion concurred in by four Justices, with three Justices dissenting, rendered a decision in this case. The decision notes that "Mr. Justice Brennan and Mr. Justice Whittaker took no part in the consideration or decision of this case."

The respondent, The Ohio Power Company, is filing contemporaneously with this Petition a "Motion for Consideration by the Full Court and a Petition for Rehearing." In that Motion and Petition we have

set out in full the reasons, based upon sound judicial administration as well as uniform practice of the Court, which should dictate a consideration of the issues in this case by all nine Justices.

Respectfully referring your Honors to that document, rather than repeating the reasons in this Petition, we pray that your Honors will consider the issues therein presented, and will then participate in the reconsideration of this case.

Respectfully submitted,

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